No. 2927

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA PACKERS ASSOCIATION, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska, Third Division.

CRIM.—No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Names and Addresses of Attorneys of Record.

WILLIAM N. SPENCE, United States Attorney, and His Assistant, WILLIAM A. MUNLEY, Attorneys for Plaintiff and Defendant in Error,
Valdez, Alaska.

DONOHOE and DIMOND, Attorneys for Defendant and Plaintiff in Error,
Valdez, Alaska. [3*]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

*Page-number appearing at foot of page of original certified Transcript of Record.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, authenticate and certify for filing in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the Writ of Error heretofore issued in the above-entitled cause, the following pleadings, records and papers on file in said cause, to wit:

1. This Praecipe.
2. Indictment.
3. Defendant's Motion to Strike Said Indictment.
4. Minute Order of the Court Denying Defendant's Motion.
5. Defendant's Demurrer to the Indictment.
6. Minute Order of the Court Overruling Defendant's Demurrer.
7. All Minute Order in Any Manner Connected With the Trial of Said Cause.
8. Verdict of the Jury.
9. Defendant's Motion in Arrest of Judgment.
10. Minute Order Denying Defendant's Motion in Arrest of Judgment.
11. Defendant's Motion for a New Trial. [4]
12. Minute Order Overruling Defendant's Motion for a New Trial.
13. Judgment and Sentence.
14. Order Extending Time to Serve and File Proposed Bill of Exceptions.

15. Defendant's Bill of Exceptions Including Order Allowing and Settling Said Bill of Exceptions.
16. Assignment of Errors.
17. Petition for Writ of Error.
18. Order Allowing Writ of Error.
19. Writ of Error.
20. Supersedeas Bond.
21. Citation upon Writ of Error Including Acknowledgment of Service on Writ of Error.
22. Order Extending Time in Which to File Record in the United States Circuit Court of Appeals, Ninth Circuit, Until February 5, 1917.

Dated at Valdez, Alaska, this 7th day of December, 1916.

DONOHOE & DIMOND,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [5]

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Indictment.

The Alaska Packers Association, a corporation, is accused by the grand jury of the Territory of Alaska, Division Number Three, by this indictment, of the crime of Wanton Waste of Salmon, committed as follows:

The said Alaska Packers Association, on the thirtieth day of July, nineteen hundred and thirteen, in the Territory and Division aforesaid, being then and there a corporation organized and existing under the laws of the State of California, unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to wit, at a point in the waters of Cook Inlet near the western shore of said inlet between the mouth of the Kustatan River, and the West Foreland in said Territory and Division, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Seward, in the Territory and Division aforesaid, the fourteenth day of October, nineteen hundred and fourteen.

WILLIAM N. SPENCE,
District Attorney.
By WILLIAM H. WHITTLESEY,
Assistant District Attorney.
WILLIAM H. WHITTLESEY,
Assistant District Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [6]

No. 437. District Court, Territory of Alaska, Third Division. The United States of America vs. Alaska Packers Association, a Corporation. Indictment—Wanton Waste of Salmon. A True Bill. C. C. Harman, Foreman. Witnesses Before Grand Jury: William J. Hunter; Hayward March. [7]

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion to Strike Indictment.

Comes now the above-named defendant by its attorneys, Messrs. Donohoe & Dimond, and moves this Honorable Court for an order herein setting aside and quashing the said Indictment on the following grounds, to wit:

1. That the said Indictment was not found, endorsed and presented as described by Chapter 6 of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that the said Indictment fails to disclose that it was found by a duly organized grand jury or that it was pre-

sented by their foreman in their presence in open court:

2. That said Indictment does not substantially, or at all, conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged therein as the crime are not clearly and distinctly set forth in ordinary and concise language, so that a person of common understanding may know what is intended.

(b) The acts and omissions charged as the crime are not set forth in such a manner as to enable a person of common understanding to know what is intended. [8]

(c) The acts and omissions charged as the crime are not set forth with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) The defects and imperfections in said Indictment are such that they actually prejudice the substantial rights of the defendant upon the merits.

3. That the facts stated in said Indictment do not constitute a crime.

4. That said Indictment is not direct and certain as regards the crime charged.

5. That said Indictment is not direct or certain as regards the particular circumstances of the crime charged.

6. That said Indictment charges more than one crime.

7. That said Indictment fails to charge but one crime, and in but one form only.

8. That said Indictment fails to sufficiently show that the crime charged was committed in the jurisdiction of said Court.

9. That said Indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

10. That said Indictment is defective because of ambiguity, duplicity and multifariousness, and because the same is involved, and wholly lacks that certainty of averment requisite to inform the defendant of the nature of the facts, or the character of the evidence, it will be required to meet upon the trial of the specific charges made.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [9]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant.

Order on Motion to Strike Indictment.

Now on this day, the motion to strike the indictment in the above-entitled cause coming on to be heard, the United States District Attorney Wm. N. Spence and his assistant, Wm. A. Munly, appearing for the Government; the defendant not being present but entering its appearance by its attorneys, Donohoe & Dimond, and after argument had and the motion being fully considered by the Court,—

IT IS ORDERED that said motion be and the same is hereby denied.

February, 1915, Term, April 2, 20th Court Day, Friday.

* * * * * * * * *

Entered Court Journal No. 9, page 43. [10]

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Demurrer to Indictment.

Comes now, the Alaska Packers Association, a corporation, the defendant herein, by its attorneys, Messrs. Donohoe & Dimond, and having heard read the Indictment herein, demurs thereto upon the grounds, and for the reasons as follows, to wit:

That it appears from the face of the Indictment:

1. That the said Indictment does not substantially conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged as the crime are not clearly and distinctly set forth in ordinary and concise language without repetition so as to enable a person of common understanding to know what is intended.

(b) That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended.

(c) That the acts and omissions charged as the crime are not stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) That the defects and imperfections of said Indictment [11] are such that they actually prejudice the substantial rights of the defendant upon the merits.

2. That said Indictment does not charge or allege facts against said defendant sufficient to constitute any offense or the violation of any law by the defendant.

3. That the facts stated in said Indictment do not constitute a crime.

4. That more than one crime is charged in the Indictment without stating it in the manner prescribed by statute.

5. Said Indictment is not direct and certain as regards the crime charged.

6. That said Indictment is not direct and certain as regards the particular circumstances of the crime charged.

7. That the said Indictment fails to sufficiently show that the crime charged was committed within the jurisdiction of the said Court.

8. That said Indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action.

9. That said Indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made.

WHEREFORE, defendant prays judgment that by the Court it be discharged and dismissed of the said Indictment.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [12]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Minute Order on Demurrer to Indictment.

The demurrer in the above-entitled cause came on to be heard this day; Wm. N. Spence, United States Attorney, and his assistant, Wm. A. Munly, appearing for the Government; and the defendant not being present in person but entering its appearance by its attorneys, Donohoe & Dimond, and after argument had and the demurrer being fully considered by the Court,—

IT IS ORDERED that said demurrer be and the same is hereby overruled.

February, 1915 Term, April 2, 20th Court Day, Friday.

* * * * * * * * *

Entered Court Journal No. 9, page 44. [13]

In the District Court for the Territory of Alaska, Third Division.

IN THE MATTER OF THE REPORT OF THE UNITED STATES GRAND JURY.

Order Re Further Deliberations of Grand Jury, etc.

NUNC PRO TUNC ORDER.

And now comes into court the United States grand jury, heretofore empaneled and sworn, in charge of their sworn bailiff, and being called and each answering to his name, present, thru and by their foreman in open court, secret indictments in criminal causes Nos. 437, 438, 439, 440, 441, 442, 443, 444, 445, 446 and 447; said indictments endorsed "A True Bill," and the same were thereupon filed in open court with the clerk of said court.

And representing to the Court that they have other and further matters for consideration, the grand jury retire in charge of their sworn bailiff for further deliberation. It is ordered that this proceeding be entered in the court journal *nunc pro tunc* as of date October 15, 1914.

Dated at Valdez, Alaska, this 2d day of April, 1915.

FRED M. BROWN,
District Judge.

[Endorsed]: Entered Court Journal No. 9, page 45. Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1916. Arthur Lang, Clerk. [14]

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL—No. 437.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Arraignment.

Now on this day came the Asst. U. S. Attorney, Wm. A. Munley; and the defendant not being present but entering its appearance by its attorneys, Messrs. Donohoe & Dimond, waived the reading of the indictments and time to plead.

* * * * * * * * *

Entered Court Journal No. 9, page No. 42.

February, 1915 Term, April 2, 20th Court Day, Friday. [15]

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL—No. 437.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION,

Defendant.

Plea.

Now on this day came the U. S. Attorney, Wm. N. Spence, and his Asst., Wm. A. Munly, appearing for the Government; the defendant not being present but being represented by its counsel, Messrs. Donohoe & Dimond, and the defendant having been duly arraigned, was asked by the court if it is guilty or not guilty of the crime charged against it in the indictment, namely, that of "Wanton Waste of Salmon," in cause No. 437, to which defendant, thru its counsel, says that it is not guilty and therefore puts itself upon the country, and the U. S. Atty., for and on behalf of the Government, doth the same, and these causes are set for trial on the first day of the fall term held in the Third Division.

* * * * * * * * *

February, 1915 Term—April 2, 1915—20th Court Day, Friday.

Entered Court Journal No. 9, page No. 46. **[16]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, do find the defendant Guilty as charged in the indictment.

Dated Valdez, September 18, 1916.

H. P. KING,
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 18, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 329. [17]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion in Arrest of Judgment.

Comes now Alaska Packers Association, a corporation, the defendant above-named, by its attorneys, Donohoe & Dimond, and moves and prays the above-named court that no judgment be rendered on the verdict of Guilty heretofore rendered by the jury herein and returned into this court on the 18th day of September, 1916, for the following reason, to wit:

I.

That the facts stated in the indictment found in

this cause and now on file herein, and upon which indictment the prosecution in this case has been had and the defendant found guilty by the verdict of a jury, as aforesaid, do not constitute a crime.

Dated at Valdez, Alaska, October 13, 1916.

DONOHOE & DIMOND,
Attorneys for Defendant.

Service of the foregoing motion in arrest of judgment, by receipt of copy thereof, acknowledged at Valdez, Alaska, this 13th day of October, 1916.

WILLIAM N. SPENCE,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 13, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[18]**

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Minute Order Denying Motion for Arrest of Judgment.

Now on this day this motion came on to be heard, Donohoe & Dimond appearing as attorneys for defendant, and W. N. Spence, United States Attorney, appearing on behalf of the Government, and after

argument had, and the Court being fully advised in the premises,—

IT IS ORDERED that this motion be, and the same is hereby denied, to which order of the Court defendant excepts, and exception is allowed.

September, 1916 Term—October 14th—30th Court Day, Saturday.

Entered Court Journal No. 10, page No. 437. **[19]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion for a New Trial.

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict of the jury herein found made and entered on the 18th day of September, 1916, finding the defendant guilty of the crime charged in the indictment herein, for each and all of the following causes materially affecting the substantial rights of the said defendant:

I.

Insufficiency of the evidence to justify the said verdict.

II.

That the said verdict is against the law.

III.

Error in law occurring at the trial and excepted to by the defendant, as follows:

(a) The Court erred in permitting plaintiff to introduce evidence tending to establish that a large number of salmon were wasted or destroyed unlawfully and wantonly by the defendant on more than one date, thus permitting the jury to consider evidence of crimes alleged to have been committed, other than the crime charged in the indictment.

(b) The Court erred in denying defendant's motion, made at the time of the introduction of the first evidence by the Government tending to establish the unlawful and wanton waste and [20] destruction of a large number of salmon by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment.

(c) The Court erred in overruling the defendant's objection to evidence tending to establish the commission of the crime alleged on any date other than the 26th day of July, 1913, that being the date elected by law as the date of the crime charged in the indictment upon the plaintiff's refusal to elect a date, as the evidence of the Government's witnesses first given tended to show a waste and destruction of a large number of salmon on the 26th day of July, 1913.

(d) The Court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of the plaintiff's testimony, as the 26th day of July, 1913, had already been

elected by law as such date; and the Court further erred in permitting the plaintiff at said time to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the same reason.

(e) The Court erred in permitting the Government to introduce, over the objection of the defendant, evidence tending to establish the wanton and unlawful waste or destruction by the defendant of a large number of salmon on any date subsequent to the 26th day of July, 1913, as evidence of subsequent collateral crimes or alleged crimes is not in any manner relevant as proof of the crime charged in an indictment.

(f) The Court erred in permitting the Government to introduce, over the objection of the defendant, evidence tending to establish the wanton and unlawful waste or destruction of a large number of salmon by the defendant on any date subsequent to the 28th day of July, 1916, the date elected by the plaintiff as the date on which the crime charged was committed, on the ground that evidence of subsequent collateral crimes or alleged crimes is not in any manner [21] relevant or competent as proof of the crime charged in an indictment.

(g) The Court erred in denying the defendant's motion for an instructed verdict of not guilty at the close of the plaintiff's testimony on each and all of the grounds set forth therein.

(h) The Court erred in denying defendant's motion for an instructed verdict of not guilty at the close of the whole case, on each and all of the grounds set forth therein.

(i) The Court erred in giving to the jury its Instruction No. 2, the giving of which was duly excepted to by the defendant in the presence of the jury before it retired, on the ground that the word wantonly was not properly defined in that the Court did not include in the definition the elements of perversity, mischief and turpitude, as was more fully set forth in the defendant's said exception taken as aforesaid.

(j) The Court erred in giving to the jury its Instruction B, in the form given, the said instruction being Instruction No. 9 offered by the defendant and requested to be given to the jury, on the ground that as given by the Court it was given subject to the qualifications and provisions of the Court's Instruction No. 8, given to the jury, the giving of said instruction being duly excepted to by the defendant.

(k) The Court erred in giving to the jury its Instruction C, in the form given, the said instruction being Instruction No. 10 offered by the defendant and requested to be given to the jury, on the ground that as given by the Court it was given subject to the qualifications and provisions of the Instruction No. 8 given by the Court to the jury, the giving of which was duly excepted to by the defendant.

(l) The Court erred in giving to the jury its Instruction No. 5, duly excepted to by the defendant in the presence of the jury and before it retired, on the ground that it admitted to the consideration of the jury evidence tending to establish collateral crimes, some of which were subsequent in date to the date of

the [22] crime charged in the indictment, and subsequent to the 28th day of July, 1913, the date elected by the Government as that of the commission of the crime charged, and on the ground that the general tenor of the second or middle paragraph of said instruction, and particularly the following quoted phrase: "This testimony was admitted only as showing a long course of conduct," etc., was such as would naturally and necessarily prejudice the substantial rights of the defendant in the minds of the jury, and that the jury would necessarily take therefrom an indication that the Court believed the defendant guilty.

(m) The Court erred in giving to the jury its Instruction No. 7, in the form given, in that it contained the following quoted provision:

> "The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the catching or trapping of salmon, to wit:"

The statement of the law referred to in the above-quoted portion of Court's Instruction No. 7 being Court's Instruction No. 8, which last-mentioned instruction is contrary to the law and is against the law. This exception was duly taken by the defendant in the presence of the jury and before it retired.

(n) The Court erred in giving to the jury its Instruction No. 8, the giving of which was duly excepted to by the defendant in the presence of the jury and before it retired, on the grounds then and there fully and completely stated and now a part of the record in this case, reference being made to said record of said statement for a more particular

specification of such grounds therefor.

(o) The Court erred in refusing to give to the jury the defendant's Instructions Nos. 2, 3, 4, 5, 6 and 7, presented to the Court by the defendant and requested by the defendant to be given to the jury, which said refusal was duly excepted to by the defendant [23] in the presence of the jury and before it retired.

(p) The Court erred in refusing to give to the jury the defendant's Instructions Nos. 9 and 10, in the form presented by the defendant and requested to be given to the jury, the Court having given such instructions to the jury as its Instructions B and C, respectively, but both said instructions as given were given subject to the qualfications mentioned in the Court's Instruction No. 8, the giving of which was also duly excepted to by the defendant as being contrary to the law and against the law.

(q) The Court erred in refusing to give to the jury defendant's Instructions Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 29, presented to the Court by the defendant and requested by the defendant to be given to the jury as its instructions in this cause, to which refusal the defendant duly excepted in the presence of the jury and before it retired.

(r) The Court erred in overruling defendant's motion, made at the close of the plaintiff's testimony, that the Court strike from the record and take from the consideration of the jury all evidence tending in any manner to establish an unlawful and wanton waste and destruction of a large number of salmon

by the defendant on any date other than the 28th day of July, 1916, that being the date elected by the plaintiff as the date on which the crime charged in the indictment was committed, on the ground that all such evidence, which the Court so refused to strike, was incompetent and irrelevant to prove the commission of the crime alleged to have been committed on July 28, 1913, and was prejudicial to the substantial rights of the defendant.

(s) The Court erred in overruling the defendant's motion, made at the close of the plaintiff's testimony, that the Court strike from the record and take from the consideration of the jury all evidence tending in any manner to establish an unlawful and wanton waste and destruction of salmon on any date subsequent to the 28th day of July, 1913, the date elected by the plaintiff as the [24] date the commission of the crime charged, on the ground that evidence tending to establish collateral crimes subsequent in date to the crime charged is incompetent and irrelevant, and was prejudicial to the substantial rights of the defendant.

DONOHOE & DIMOND,
Attorneys for the Defendant.

Service of copy of the foregoing motion for a new trial admitted at Valdez, Alaska, this 19th day of September, 1916.

WILLIAM A. MUNLY,
Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 19, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [25]

In the District Court for the Territory of Alaska. Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Minute Order Denying Motion for New Trial.

Now on this day, this motion came on to be heard, Donohoe & Dimond, appearing as attorneys for defendant, and W. N. Spence, United States Attorney, appearing on behalf of the Government, and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that this motion be, and the same is hereby denied, to which order of the Court defendant excepts and exception is allowed.

* * * * * * * * *

September, 1916 Term—October 14th—30th Court Day, Saturday.

Entered Court Journal No. 10, page No. 437. **[26]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION.

Judgment and Sentence.

And now on this day came the Assistant United States Attorney; also came the defendant herein, Alaska Packers Association, a corporation, by Donohoe & Dimond, its attorneys; and the defendant, Alaska Packers Association, a corporation, having on a prior day of this term been duly convicted, by verdict of a jury, of the crime charged against it in the indictment herein, namely, that of wanton waste of salmon;

It is now therefore the judgment and sentence of the Court that you, Alaska Packers Association, a corporation, pay a fine of two hundred ($200) dollars, said fine to include all costs.

Done in open court this fourteenth day of October, nineteen hundred and sixteen.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 10, page No. 438. [27]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Minute Order Fixing Amount of Supersedeas Bond and Granting Sixty Days' Time in Which to File and Settle Bill of Exceptions.

Now on this day, on motion of Donohoe & Dimond, attorneys for defendant,—

IT IS ORDERED that the supersedeas bond in this cause be fixed at the sum of five hundred dollars ($500), and that the defendant have sixty days from this date in which to file and settle bill of exceptions.

* * * * * * * * * * *

September, 1916 term—October 16th–31st, Court day, Monday.

Entered Court Journal No. 10, page No. 440. [28]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [29]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Bill of Exceptions and Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard on Saturday, the 16th day of September, 1916, before

the Honorable FRED M. BROWN, Judge of said court, and a jury:

The plaintiff herein being represented by Honorable WILLIAM A. MUNLY, Assistant United States Attorney:

The defendant herein being represented by its attorneys and counsel, Messrs. DONOHOE & DIMOND:

Opening statements were made to the Court and jury by Mr. Munly on behalf of the Government and by Mr. Dimond on behalf of the defendant.

WHEREUPON the following additional proceedings were had and done, to wit:

Mr. MUNLY.—It is admitted, is it not, that this defendant is a corporation, organized under the laws of the State of California and doing business in the Territory of Alaska?

Mr. DIMOND.—We make that admission, yes, sir.

The COURT.—The record will so show.

Monday, September 18, 1916.

MORNING SESSION.

Testimony of Hayward March, for the Government.

HAYWARD MARCH, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. MUNLY.)

Q. You may state your name.

A. Hayward March.

Q. Where do you live?

A. Kenai, Cook's Inlet, Alaska.

Q. How long have you lived there?

(Testimony of Hayward March.)

A. A little over eighteen years.

Q. What is your business, usually?

A. Fishing.

Q. Do you know Captain Williams, superintendent of the Alaska Packers Association?

A. Yes, sir.

Q. Did you know him in 1913? A. Yes, sir.

Q. Did you meet him at Kasiloff?

A. Yes, sir.

Q. About the latter part of April, 1913?

A. Yes, sir.

Q. State if you had a conversation there in regard to getting fish for him. A. Yes, sir.

Q. What was that conversation, what was it about? [31]

A. Me and Mr. Hunter went to Kasiloff on or about the 28th of April, if I remember right, about that time. We landed there in a small boat, called a sloop, landed on the beach—don't know what time of day it was. We went up on the wharf, me and Hunter and I met Captain Williams and he met me; I knowed him and he knowed me. He said, "Well, March, what can I do for you"? I said, "I came down to see about fishing—I understand you are going to buy fish and let out gear, and so on." He says, "What gear do you want—trap gear"? and I said, "Trap gear," and he said, "Make out your list of what gear you want and give it to the beach boss on the wharf, as he is the man that handles that gear." And I spoke about the fish and he said, "I will take all your fish and furnish scows, as we have

(Testimony of Hayward March.)

steamers and scows and the Alaska Packers Association can afford to pay you for what little fish you catch," as Captain Williams knew I wasn't going to catch a hundred thousand fish—

Mr. DIMOND.—We object to that.

The COURT.—Tell the conversation.

The WITNESS.—I got the gear, such as wire—

Mr. DONOHOE.—We object to that as not responsive to the question—the question was to state the conversation that took place between Captain Williams and this witness.

The WITNESS.—Mr. Williams told me he would furnish me the gear and take what fish I would catch—furnish me the scows, as he had steamers and the Alaska Packers Association could pay me for what little fish I would catch.

Q. State whether or not he said he would send a boat there for your fish.

Mr. DONOHOE.—We object to that as leading—the witness has already testified to the conversation.

Objection overruled—defendant allowed an exception. [32]

Q. State whether or not he said he would send a boat there for your fish. He said he had scows and boats, did he?

A. He had scows and steamers and he would take what little fish I would catch, as the Alaska Packers Association could afford to pay me.

Q. Now, tell us what gear you got.

A. We got guy wires, nails—

Q. How much guy wire?

(Testimony of Hayward March.)

A. Three coils, if I remember, of guy wire; we got nails, a quantity of nails, they were not weighed; they were given to me by the beach boss, the quantity I thought would do me at the time,—if I wanted any more I could send back to the cannery and get them; hammers and such things as we needed to start our trap with. We put them in the sloop and Mr. Williams had ordered one of his gas boats to tow us out to the river—

Q. What else did you get?

A. Nails—no webbing wire at that time, as he said he was busy at that time and would send it later on.

Q. Did you get it later on? A. Yes, sir.

Q. How much?

A. Eight coils of wire webbing.

Q. How many feet would that be?

A. Two hundred feet in a coil, I believe it was—it is over 150 feet—some call it 150 and some 200 in a coil.

Q. Eight coils? A. Eight coils.

Q. That is guy wire, the webbing wire—did you get anything else?

A. We have taken no webbing wire when we started from the cannery.

Q. Did you get anything else?

A. 400 feet of cotton web. [33]

Q. Nails?

A. Nails; 200 battens for the floor of the trap.

Q. What was that?

A. Battens for the floor of the trap, two by twos.

Q. Did you ever enquire the cost of web wire?

(Testimony of Hayward March.)

A. I have as to the cost of wire in Kenai—I have been told it would cost me $18 a roll.

Q. How many rolls did you get in this case?

A. Eight rolls.

Q. Do you know about how much the cost of the web would be,—I mean the cotton web?

A. No, I have no idea.

Q. How many feet of guy wire did you get?

A. I can't say how many feet—I had three coils; I don't know how many feet in a coil of guy wire.

Q. A hundred or two hundred?

A. Yes, there is quite a lot of wire in a coil of guy wire.

Q. How big is the guy wire?

A. It isn't very large.

Q. A quarter of an inch?

A. No, it is not that large, I don't believe.

Q. One-eighth? A. Probably.

Q. Pretty heavy wire, isn't it?

A. Yes, fairly heavy guy wire.

Q. You had several hundred feet of it?

A. Yes, sir.

Q. Did they furnish any other boat besides the scow?

A. Yes, they furnished me one more boat, a double-ender Columbia River boat.

Q. How big was the scow? [34]

A. A large fishing scow to keep stationary, a large fishing lighter; it would carry probably eight thousand fish. I saw the same scow this spring in Kuskatan with 1800 king salmon in it, the same scow I

(Testimony of Hayward March.)

had in 1913, and she was loaded this spring in Kuskatan with 1800 king salmon.

Q. Did you build the trap?

A. We got to Kuskatan about the second day of May.

Q. Point out where Kuskatan and Kasiloff are on this map.

A. I couldn't very well explain it on the map, on the chart.

Q. Here is Kasiloff and here is Kuskatan.

A. Yes, sir—and this is East Foreland and this West Foreland.

Q. And here is the cannery? A. Yes, sir.

Q. Did you construct a trap at Kuskatan?

A. Yes, sir.

Q. What kind of a trap was it?

A. It was what we call a mosquito trap—it is the traps we had in olden times in Kenai and Kasiloff.

Q. Look at that drawing there of a trap and say if that is the kind and description.

A. That is a model of the trap I had in Kuskatan.

Mr. MUNLY.—We ask that that model be introduced in evidence by the Government. It is merely for the purpose of illustration; we do not claim it is absolutely correct. The map is admitted in evidence as Plaintiff's Exhibit "A"; it is attached hereto and made a part hereof. It is understood that it is admitted only for the purposes of illustration and no claim is made that it is accurate or perfect.

Q. Describe the features of that trap.

A. This is our old-times traps in Cooks Inlet years

(Testimony of Hayward March.)

ago. This is the beach here, the shore line.

Q. The lower line? [35]

A. The lower line. You start from the beach with the first of your lead. You have stakes every six to seven feet; you start here and keep driving your stakes until you get out to your pot, you drive to the rim of your pot.

Q. On the lead you have what?

A. Large stakes like this; you drive them as far down as you can get them, so you can leave enough of the stake to splice a pole on; probably the stake is two or three feet above the ground. You drive them as far as you can but you must leave enough to splice a pole on. When you get the short stakes all driven, you take poles and as you go out the poles get longer and when you get to the pot the poles are 30 to 35 feet long according to the depth of the water. That is the way you build your traps, and you have the boats so that on the big run of the tide, you can work around this pot an hour or an hour and a half while the tide is out. You have dry land so you can fish up the floor of your trap before the tide comes in and drives you away.

Q. *You* long is your lead in this trap?

A. About five hundred feet, maybe a little longer.

Q. From the shore to the heart?

A. Yes, sir, from the shore to the heart, to the entrance of the heart.

Q. How do the fish get in?

A. When these poles are up, there is capping or ribbons around these poles to steady the poles; then

(Testimony of Hayward March.)

we guy these poles from side to side. After that is secured, then we put the web on—the trap can't catch any fish until the web is on—we put the web pretty deep and it goes down to the bottom and the fish come along the beach and they strike the lead and swim out and go into the heart and then into the pot and when you fish these traps, [36] you have a door on this side, another man will have the door on this side,—it is according to the place you are at and where you want your door; if it is convenient to have your door here, you have it here and if convenient at this end, you have it there—it is up to you.

Q. How are the pot and heart constructed? In this shape, as indicated on this map?

A. Yes, sir, just the same as the shape here. They come along the lead all the way, sometimes on the beach, and they swim along and come into this entrance and go into the pot—that is the entrance into the pot.

Q. This map does not show how it is constructed from the top down to the water?

A. No, sir; these stakes are driven down and about two feet left up to splice to like this—that is the way your lead is and another one here, and probably some of these stakes are five feet apart and some eight feet apart, on account of the ground underneath. If I drive a stake here and can't get it down very far, I will put one close up and if that stake goes down solid, I will go probably eight feet further—that is the way we construct these hand traps.

Q. Is the heart constructed the same way?

(Testimony of Hayward March.)

A. Yes, sir, the same way.

Q. And the pot the same way?

A. And the pot the same way.

Q. These poles are covered by what?

A. They are braced with what we call ribbons.

Q. And are covered with what? A. Webbing.

Q. What kind of webbing?

A. Wire webbing—I had wire webbing on the pot and the heart and [37] cotton webbing on the lead.

Q. Cotton webbing on the lead? A. Yes, sir.

Q. Was it double or single? A. The webbing?

Q. Yes. A. Single webbing.

Q. You said the lead was about five or six hundred feet?

A. Yes, sir, between five and six hundred—I can't exactly tell to the foot.

Q. What were the dimensions of the heart?

A. I believe my heart was 90 feet on each side.

Q. On each wing?

A. On each wing. This is the entrance to my pot here—I can't rightly say but I believe it was 90 feet from here to the entrance to the lead.

Q. Ninety feet one way or all around?

A. From here, right around.

Q. It would be 45 feet then?

A. Ninety feet on each side.

Q. This would be 90 feet?

A. From here, right around, the whole thing.

Q. (By the COURT.) What was it on one side—the upper line, what was the length of that?

(Testimony of Hayward March.)

A. Well, I wouldn't be able to just tell—the whole business I believe was 90 feet.

Q. That was 40 feet or 45 feet?

A. Yes, something like that.

Q. On each side— Was the other one about the same size?

A. Yes, we ain't particular within a few feet—we have no rule or square in building a trap. [38]

Q. What is this marked jigger—what is that for?

A. That is, when the fish go out and hit that jigger, so it will turn them and get them to hit the lead and sheer them into the heart.

Q. Is the jigger covered also with gear?

A. Yes, sir.

Q. The same way as the other?

A. The same way as the other.

Q. How large was your pot?

A. My pot was 24 by 30, I believe it was.

Q. Which way was the 30?

A. Thirty feet out this way and 24 feet this way, on account of the battens being 24 feet long and I didn't have a saw or splice.

Q. From the heart out to the outer line would be—

A. From here to here would be about 30 feet.

Q. And from the two sides—

A. That would be 24 feet long, 24 feet this way and 30 feet this way.

Q. Was there a flooring in that pot or heart?

A. Yes, sir, in the pot.

Q. How high was that flooring from the water?

A. A little over four feet, or five.

(Testimony of Hayward March.)

Q. Where was your door on the pot?

A. The door was at the outside, here.

Q. What was the size of your door?

A. The door was about, between four and five feet—it wasn't over five feet.

Q. Well, now, the fish came in on the floor of the pot? A. Yes.

Q. How high was it from the floor of the pot to the upper part of [39] the pot?

A. From the floor to the top, up to the top of the trap was 24 feet high.

Q. I mean from here down to the bottom?

A. Yes, from the top, what we call the capping, down to the floor was 24 feet high.

Q. How many fish would that trap contain approximately?

Mr. DIMOND.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. That would be very hard for me to tell.

Q. Would it contain 1000 or 2000 or 3000 or what?

A. When we built it we expected it to hold—

Mr. DIMOND.—We object to what he expected.

Objection overruled. Defendant allowed an exception.

A. (Continued.) When we build them small traps we look for the trap to hold ten or twelve thousand fish at least, when we build, them.

Q. Would it hold them?

A. Yes, sir, it would hold that.

(Testimony of Hayward March.)

Q. It would hold ten or twelve thousand fish?

A. Yes, sir.

Q. You say they furnished you a scow?

A. Yes, sir.

Q. And also a lighter, a double ender Columbia River boat? A. Yes, sir.

Q. How large was that Columbia River boat?

A. I think it must have been 30 feet—I never measured it.

Q. Tell about how large it was?

A. A good sized boat, I couldn't just say. [40]

Q. How wide was it?

A. It must be eight feet beam.

Q. About how large was the scow?

A. The scow was a very large scow,—it packed 1600 king salmon, I know.

Q. How long was the scow, about—was it longer than the boat? A. Oh, yes.

Q. Was it forty feet—you said the other was thirty feet?

A. That scow was very large; it was used for the fish lighter, but we call a scow the big long lighter we had there, an 8000 fish scow lighter.

Q. Would it be fifty or sixty feet long?

A. I couldn't judge how long that boat is.

Q. Was it longer than the lighter, than the Columbia River boat? A. Yes, sir.

Q. Was it twice as long?

A. Twice as long, yes.

Q. Was it twice as wide?

(Testimony of Hayward March.)

A. It was about twice as wide as the Columbia River boat.

Q. Where was this scow stationed in regard to the pot?

A. This scow is anchored from the pot so that it will give the scow water enough for the steamer to come alongside of that scow on any tide, low water or high water or any time. There was three fathoms of water where that scow was anchored at low water, so the steamer can go and take the fish from this lighter, that is, the fish lighter.

Mr. DIMOND.—We object as not responsive.

The COURT.—State where it was anchored?

A. I couldn't say how far from the pot, because I never measured the distance.

Q. About how far compared with your lead? Out as far as your lead? [41]

A. Oh, yes. That scow from my trap, I guess it wouldn't be as far as half way out to the Valdez wharf. I could look at the distance on the water if it was anchored and could tell.

Q. How would it be as compared with your lead? You say your lead was five or six hundred feet—would it be half that distance?

A. Yes, further than that.

Q. Would it be the whole distance of your lead?

A. Yes, twice as far as my lead.

Q. That is where the scow was anchored, was it? Was it anchored permanently there?

A. Yes, the captain of the "Reporter" brought it there and anchored it there.

(Testimony of Hayward March.)

Q. All during the time you were fishing?

A. Yes, during the time we were fishing.

Q. Did you have any means of conveying the fish from the trap to the scow? A. Yes, sir.

Q. How did you convey them?

A. I had this Columbia River boat and one more boat besides.

Q. How many fish would that Columbia River boat contain? A. I counted 900 from that boat.

Q. On the Columbia River boat? A. Yes, sir.

Q. How many fish could you take out there in a day, from the pot to the scow?

A. I could take considerable fish, providing I had the fish.

Q. If you had two thousand fish could you carry them out in a day?

A. I would be a poor fisherman if I couldn't.

Q. Could you take three or four thousand fish out?

A. Yes, sir. [42]

Q. Now, what time did you complete this trap? You say the agreement with Williams occurred the latter part of April, 1913? A. Yes, sir.

Q. At Kasiloff? A. Yes, sir.

Q. Captain Williams is the same gentleman who is sitting here? A. Yes, sir.

Q. Manager of the Alaska Packers Association?

A. Yes, sir.

Q. Now, when was the trap completed, after you got all this gear?

A. The trap was completed, if I remember right, on the 25th day of May—I believe it was the 25th

(Testimony of Hayward March.)

day of May the trap was completed for fishing.

Q. Did you start in fishing then? A. Yes, sir.

Q. What kind of fish was the first run?

A. King salmon and a few Reds mixed up with the king salmon.

Q. State whether the cannery boat came from the Alaska Packers Association to take these fish away?

A. Yes, sir, during the king salmon season.

Q. How often did they call?

A. They called every other day.

Q. For what length of time?

A. Until the king salmon ceased.

Q. From about May 25th until what time?

A. From about May 25th and I believe June 25th the king salmon stopped running.

Q. So they called from about May 25th to about June 25th? A. Somewhere around that time.

Q. Did they call after that? [43]

A. Very seldom.

Q. Did they call in July? A. Yes, sir.

Q. Do you remember what time they called in July?

A. I remember but I ain't positively sure, but I believe the "Reporter" called on the 18th of July, but I ain't rightly sure—I have been thinking this over, that she called the 18th, but I ain't rightly sure.

Q. Did you go from the trap to your home in Kenai any time during the month of July?

A. Yes, sir.

Q. State about that?

A. The time I went over to Kenai, I went there on

(Testimony of Hayward March.)

the "Libby," McNeil boat, the "Libble B." The king salmon season stopped running and I wanted to get home a few days and see my wife and family and I could catch the Kasiloff boat and walk up about two miles—

Mr. DIMOND.—We object to that.

Q. State about your trip?

A. This was the latter part of July. The king salmon season was over and the "Libby," McNeil camping outfit were going home.

Q. What time did you return then from Kenai?

A. I returned back to Kuskatan on the 5th day of July.

Q. How often did the boat call after that?

A. I don't remember only the 18th, up to the 28th day of July.

Q. Do you remember of Captain Williams' calling there?

A. I remember Captain Williams calling in the spring, when we started in fishing, once on the steamer.

Q. Calling at the trap? A. Yes, sir.

Q. What time?

A. I don't remember what day and date it was. [44]

Q. Do you remember whether it was in June?

A. Yes, it was in June.

Q. What did he say?

A. I had a little breakdown in my lead and wanted to send to the cannery for a little gear and a few nails to fix it up and Captain Williams was on the

(Testimony of Hayward March.)

boat and spoke to me and told me to get a move on me and get my trap fixed up because he was after fish.

Q. About what time did the red fish run begin?

A. The run, what we call the run of red fish, started on the 24th.

Q. The big run of red fish?

A. The big run of red fish.

Q. The 24th of what? A. July.

Q. 1913? A. Yes, sir.

Q. What did you do?

A. The morning of the 24th of July I got up as usual. We can take a glass and look at the trap on high tide and if there is a quantity of fish in your trap, you can see them, and as I done that, I said to Mr. Hunter, "I guess the run of salmon is in." I took the boat and went out to the trap and Hunter started to fix the sloop up—it was lying there from the month of May up to that time—to get word to Captain Williams. I didn't pay much attention to Hunter and he didn't to me. I went to work the trap and took out 2500 fish that day and put them in the scow—2500 red fish.

Q. Took them out of the trap? A. Yes, sir.

Q. On that day that you spoke to Hunter?

A. Yes, sir, the 24th. [45]

Q. And you put them on your scow? A. Yes.

Q. Did you take out any the next day?

A. The morning of the 25th Mr. Hunter went to Kasiloff.

Mr. DIMOND.—We object to that as not responsive.

(Testimony of Hayward March.)

Q. Did you take out any the next day?

A. Yes, sir.

Q. How many did you take out that day?

A. 2500.

Q. Did you say that Hunter went away from the trap? A. Yes, sir.

Q. Where did he go? A. Kasiloff.

Q. When did he leave? A. The 25th.

Q. Of July? A. Yes, sir.

Q. These 2500 salmon you took out, red fish, you took out on the 24th? A. Yes, sir.

Q. And 2500 on the 25th? A. Yes, sir.

Q. Did any boat call from the cannery on those days? A. No, sir.

Q. How many did you take out on the 26th?

A. About a thousand.

Q. Did you do anything with the salmon you took out on the other two days?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial testimony and at this time we object to the introduction of any testimony whatever tending to show or establish that salmon were wasted or destroyed [46] at the place named in the indictment on any other date than the date alleged in the indictment, which was the 30th day of July, unless the Government at this time elects to announce the date on which they propose to hold this defendant under this indictment.

By the COURT.—The objection will be overruled and exception allowed. The evidence will be ad-

(Testimony of Hayward March.)

mitted for the purpose of showing the intent or the manner in which the defendant acted with regard to getting salmon or failing to get them and not as tending to establish the waste of fish on the day alleged in the indictment.

Mr. DONOHOE.—We make the further objection that you cannot introduce evidence tending to establish collateral crimes for the purpose of establishing the crime alleged.

Objection overruled. Defendant allowed an exception.

Q. On the 26th you say you took out a thousand?

A. Yes, sir.

Q. On the 27th did you take out any?

A. Yes, sir.

Q. How many? A. About a thousand fish.

Q. You say the boat did not call on the 24th?

A. No, sir.

Q. Nor on the 25th? A. No.

Q. Did it call on the 26th? A. No.

Q. I mean the cannery boat? A. No, sir.

Q. That boat was called what?

A. The "Reporter." [47]

Q. The "Reporter" didn't call on either of these three days? A. No, sir.

Q. Did it call on the 27th? A. No, sir.

Q. How many did you take out on the 27th?

A. About a thousand fish.

Q. Now, you had 2500 on the 24th, 2500 on the 25th, a thousand on the 26th and a thousand on the 27th?

A. Yes, sir.

(Testimony of Hayward March.)

Q. What became of these fish?

A. On the 26th—

Mr. DONOHOE.—We renew our objection to this question.

Objection overruled. Defendant excepts.

A. On the 26th I have taken out about a thousand fish. I kicked them into the two boats I had. There was too much for one boat and I divided them up into two boats and I took those fish out and put them all in one boat—it was smooth water and I kept the fish there all day until evening thinking the steamer would come.

Mr. DONOHOE.—Is that the evening of the 26th you are speaking of?

A. Yes, sir. And the steamer didn't come, and I held the 5000 fish I had in the scow; I dumped them overboard and threw the fresh fish in. On the 27th I took out about a thousand fish and threw them into the scow.

Q. When did the boat come, the "Reporter," the cannery boat? A. The 28th.

Q. The cannery boat came on the 28th?

A. Yes, sir.

The COURT.—How far is it from the cannery to this trap, about?

A. About 28 miles.

Q. It came on the 28th—at what time, in the morning or evening? [48]

A. I believe on the flood tide—it was somewhere around high water I know, when the boat came.

Q. What time? A. I couldn't exactly tell.

(Testimony of Hayward March.)

Q. How many fish did you have for them then?

A. I had then two thousand fish in the scow.

Q. What was done with those?

Mr. DONOHOE.—We object to that question on the ground that the law has elected for the Government to fix the charge, charge the crime, on the first day evidence was introduced tending to establish a crime. * * They cannot introduce evidence of a crime subsequent to the date either alleged in the indictment or fixed by the evidence. My position is this, that you cannot introduce evidence of the collateral crime for the purpose of establishing the crime alleged in the indictment, excepting for identity or as part of the res gestae.

The COURT.—The evidence will be received for the purpose of throwing light on this agreement between the defendant company and the prosecuting witness, showing their methods or manner of getting these fish. * *

Mr. DONOHOE.—I understand the ruling of the Court to be that evidence will go to the jury covering the period of time during which any fish were wasted there as testified to by the witness.

The COURT.—Testimony will be introduced showing the entire operation of this trap, as tending to throw light on the charge in this case, that on a certain day they were wasted, showing the methods used and the calling of defendant's boats or their not calling, as the case may be and showing the entire circumstances, so it can be ascertained whether they did use reasonable diligence and care in the protec-

tion of these fish or whether they wantonly [49] and recklessly wasted and permitted them to be destroyed—that is the question here.

Mr. DONOHOE.—So I may conduct my examination properly and understand the position of the Court, I wish to ask at this time what particular day you will instruct the jury—if they should find a verdict against the defendant on what particular date they must find the fish were wasted.

The COURT.—On the date alleged in the indictment, I take it.

Mr. DONOHOE.—The 30th day of July.

The COURT.—Yes, sir. We can take these matters up on the question of instructions.

Mr. DONOHOE.—We object to the introduction of any evidence tending to establish that any salmon were wasted or destroyed at the place alleged in the indictment on any other date than the 26th day of July, 1913, being the date first fixed by the evidence introduced by the Government.

Objection overruled. Defendant allowed an exception.

Mr. DONOHOE.—And we further demand that the Government elect the date on which they propose to stand for a conviction in this case.

The COURT.—I am not going to require the Government to do that. The indictment charges a certain date here and when it comes to the instructions, the jury will be instructed as to the dates on which the crime can be sustained, if at all.

Defendant allowed an exception to the ruling.

(Testimony of Hayward March.)

Q. What was done on the 28th?

A. On the 28th the steamer "Reporter" called, Captain Christiansen. He asked me what fish we had in the scow and I told him I had 2000 fish in the scow. "Well," he says, "I have got orders from the superintendent to come over and give you a receipt for what fish you have got, but I ain't going to take them." [50]

Q. He wouldn't take any?

A. He didn't take any.

Q. What became of the fish?

A. I threw them overboard.

Q. He wouldn't take the fish? A. No.

Q. Did he go away without any fish?

A. I scooped a few fish out alive as he laid there—I ripped the webbing from my trap and took them out with a scoop net, but I didn't count them. He gave me a receipt for the 2,000.

Q. He gave you a receipt for the 2,000 and told you to throw them overboard? A. Yes, sir.

Mr. DONOHOE.—We object to that—he didn't say that—to throw them overboard.

Q. Well, he wouldn't take them? A. No, sir.

Q. On the 29th of July did you have any fish?

A. Yes, sir.

Q. How many fish?

A. I had a few hundred fish, four or five hundred fish.

Q. On the 30th of July did you have any?

A. About the same.

Q. Four or five hundred fish?

(Testimony of Hayward March.)

A. Four or five hundred fish.

Q. Did the "Reporter," the cannery boat, call on the 29th or 30th for any fish? A. No, sir.

Q. Did you have any on the 31st of July?

Mr. DONOHOE.—We object to any testimony being introduced as to what happened on the 31st of July on the grounds stated in [51] our previous objection and on the further grounds that this is a date subsequent to the date laid in the indictment, mentioned in the indictment, which is the 30th day of July.

Objection overruled and exception allowed defendant.

Q. The day Captain Christiansen came with the boat was on the 28th, the 28th day of July, 1913?

A. Yes, sir.

Q. At that time he gave you a receipt as you have said? A. He gave me a receipt for 2,000 fish.

Q. And what became of the fish?

A. I threw them overboard.

Q. He wouldn't take the fish you said?

A. No, sir.

Q. Now, on the 29th day of July, 1913, how many fish were caught in the trap?

A. I had four or five hundred fish.

Q. On the 30th day of July, 1913, how many fish?

A. About the same quantity of fish, between four and five hundred fish.

Q. And on the 31st day of July, 1913?

Mr. DONOHOE.—We renew our objection.

(Testimony of Hayward March.)

Objection overruled. Defendant allowed an exception.

Q. Did you have any fish that day?

A. Yes, sir.

Q. How many fish did you have that day?

A. About the same, four or five hundred fish.

Q. On the first day of August, did you have any?

Mr. DONOHOE.—We make the same objection.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. On the second day of August how many fish did you have? [52]

Mr. DONOHOE.—Same objection.

Objection overruled. Defendant allowed an exception.

A. I had a few hundred fish, probably three or four hundred fish each day—the fish were getting slack then.

Q. Did the boat, the cannery boat, the "Reporter," call on the 29th day of July, 1913?

A. No, sir.

Q. Did it call on the 30th day of July, 1913?

A. No, sir.

Q. What was done with the fish caught on the 29th and 30th days of July, 1913?

A. I left them in the scow until they got rotten and I threw them overboard.

Q. Did the cannery boat call on the 31st day of July, 1913?

Mr. DONOHOE.—We make the same objection.

(Testimony of Hayward March.)

Objection. Defendant allowed an exception.

A. No.

Q. Did the cannery boat call on the first day of August, 1913?

Same objection.

Objection overruled. Defendant allowed an exception.

A. No, sir.

Q. When did the cannery boat next call after the 31st day of July, 1913?

Same objection.

Objection overruled. Defendant excepts.

A. I believe the cannery boat called on the 28th—I don't remember of the boat calling only once, the day I quit fishing, that day I remember well—the last day I done my fishing; I believe the cannery boat called on the 5th day of August, I ain't rightly sure, but she called one time from the 28th to the 8th of August, the day I quit fishing. **[53]**

Q. Did you catch any fish on the 4th day of August?

Same objection.

Objection overruled. Defendant excepts.

A. Yes, sir, a few hundred.

Q. How many fish that day?

A. Three or four hundred fish.

Q. On the 5th day of August, did you have any?

Same objection.

Objection overruled. Defendant excepts.

A. Yes, sir.

Q. How many? A. A few hundred fish.

(Testimony of Hayward March.)

Q. Did the cannery boat call that day?

A. I don't remember.

Q. Did they take any fish that day?

A. They have taken no fish.

Q. They called once?

A. I believe, I couldn't right say, but I believe they called on the 5th of August—they called once from the 28th up to the 8th of August; that was the last time the boat called.

Q. Did they call on the 8th day of August?

A. On the 8th day of August the boat came—I had a little over 800 fish and the Captain told me—

Mr. DONOHOE.—We object to that on the same ground.

Objection overruled. Defendant excepts.

WITNESS.—(Continuing.) On the 8th day of August I had a little over 800 fish. The Captain came and he told me he had orders from the superintendent not to take any of the fish only what was fresh caught out of the water. Well, I had a talk with the Captain like a man would and I told him I couldn't send live [54] fish and what did the superintendent intend to do with me, keep me here all summer throwing away our fish and losing my time for nothing and I said I am disgusted and I am going to quit and Mr. Hunter notified him and him and I quit fishing.

Q. How many fish were there that day?

A. A little over 800 fish.

Q. How many were thrown overboard?

Mr. DONOHOE.—We object on the same ground.

(Testimony of Hayward March.)

Objection overruled. Defendant excepts.

A. About 800.

Q. So the cannery boat did not call from the 28th of July except one time, just prior to August 8th?

A. One time, but I don't remember exactly the date, but she called once I believe from the 28th of July up to the 8th of August.

Q. And what became of the fish you had collected from the 28th of July up to the first or second time the cannery boat called—what did you do with them?

Same objection.

Objection overruled. Defendant allowed an exception.

A. I threw them overboard.

Q. Now, coming back to the conversation you had with Captain Williams in the latter part of April, at Kasiloff, when you made this agreement or arrangement with him for taking the fish—who was present at that conversation? A. Mr. Hunter.

Q. Your partner? A. Yes, sir.

Q. With whom did Captain Williams have the conversation, with you or with Mr. Hunter?

A. I am the man that made the arrangement with him. [55]

Q. Who was the man that looked after the trap, largely after the trap? A. I am the man.

Q. Who is the man that knows more about the business at that trap? A. I am the man.

Q. At that conversation did Captain Williams tell you or say anything to you in regard to taking care of any surplus fish? A. No, sir.

(Testimony of Hayward March.)

Mr. DONOHOE.—We object to that and move to strike the answer on the ground that it is leading—the witness has already testified to the entire conversation as he remembers it.

Objection overruled and motion to strike denied. Defendant allowed an exception to the ruling.

Q. He didn't say a thing about taking care of any fish that he couldn't take care of? A. No, sir.

Mr. MUNLY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. When did you go into partnership with Mr. Hunter in this fishing enterprise?

A. I went in about the 30th of April. I went to Mr. Hunter and we talked the thing over.

Q. You say about the 20th of April? A. Yes.

Q. What material did Mr. Hunter have on the ground for the erection of this trap at the time you got the webbing from Captain Williams?

A. He had the poles and the stakes. **[56]**

Q. Right up on the beach? A. Yes, sir.

Q. He got them out the previous winter?

A. Yes, sir.

Q. How far did he have to go to get that material?

A. I couldn't tell you because I wasn't in the woods there any distance.

Q. There is timber right around there, handy?

A. Yes, sir.

Q. Timber right down to the beach?

A. No, you have got to go back a little, a mile or a mile and a half before you get timber.

(Testimony of Hayward March.)

Q. What is on the beach?

A. Nothing, only rocks and hills.

Q. After you get up the hills, is there alders on it?

A. Yes.

Q. And scrub pine? A. Yes, and scrub spruce.

Q. And hemlock? A. Yes, sir.

Q. That comes right down close to the beach?

A. Yes, sir. There is a big bank about 800 or a thousand feet up from the beach.

Q. Now, talking about that scow—that scow was not originally sent over for your exclusive use?

A. Captain Williams—I asked him, and he told me he would furnish me a scow, as I had a trap there and I expected that—if he had said no, I wouldn't have built the trap.

Q. In the early part of the season that scow was used by other gill-net fishermen as well as you?

A. Yes, sir. **[57]**

Q. And in the king salmon season it was used generally by you and other gill-net salmon fishermen? A. Yes, sir.

Q. Did you catch most of your king salmon by gill-nets?

A. Some in the trap and some in the gill-nets.

Q. You caught a majority of them in the gill-nets?

A. Quite a few in the gill-net.

Q. And that scow was used jointly by you and several other gill-net fishermen?

A. Yes, they had one scow there and there was room enough on the scow for all of us at that time.

Q. And it was used that way until the red salmon

(Testimony of Hayward March.)

run commenced—during the king salmon run?

A. When the king salmon men left there, the scow was left in charge of me.

Q. Who left it in charge of you?

A. It must have been Mr. Williams.

Q. Who left it in charge of you?

A. The scow was left there, it wasn't taken away and I suppose it must have been left there by the superintendent.

Q. This scow was about sixty feet long?

A. I couldn't say it was sixty feet—it was a pretty large scow.

Q. You said twice as long as the Columbia River dory? A. I guess so.

Q. And how long is the dory?

A. About 24 or 25 feet, I never measured it and couldn't say to the foot or inch.

Q. Did Captain Williams or anybody connected with the Alaska Packers Association ever instruct you how or where you should build your trap?

A. No, sir. [58]

Q. Did they ever instruct you how you should manage your trap? A. No, sir.

Q. You and Hunter owned that trap and had complete control of it?

A. We were boss of it while we were there.

Q. You were boss of it during the season?

A. Yes, sir.

Q. And you fished when you wanted to fish and didn't fish when you didn't want to?

A. We fished every morning.

(Testimony of Hayward March.)

Q. Did you fish every morning during the month of July?

A. Yes, sir, every morning I went and looked at the trap, fish or no fish—it was my duty.

Q. You fished whenever you wanted to—nobody had any control over you?

A. No, nobody had any control to order me to do this.

Q. Captain Williams had no representative at this trap at all? A. No.

Q. How far is that Indian village from the trap?

A. That Indian village is probably 3,000 feet up over the hill—I couldn't just say, it is not a great ways, but there is a big hill to climb up to get there.

Q. It is an ordinary bank, up from the waterfront?

A. A very high bank.

Q. How much bare ground at low tide was there between the outer edge of the pot of your trap and low water?

A. I couldn't say the amount of ground there was, because I never measured the distance—I simply go by my judgment.

Q. What was your judgment?

A. The fact of the matter is, when I am fishing, I am not very much interested in looking at the ground.

Q. That is the best answer you can make at this time to that [59] question?

A. I couldn't answer just the distance.

Q. How far was the scow out from the pot?

A. The scow was probably between a quarter and

(Testimony of Hayward March.)

a half mile, probably—not measuring the distance but just by judgment.

Q. About half a mile out?

A. Probably between half and a quarter—I wouldn't say it was half a mile or a quarter,—it was a little distance, I call it.

Q. Your judgment about that distance is about the same as the distance the Indian village was away? A. I never measured this distance?

Q. Where did you live when you were at this trap?

A. I lived in a dugout, in the banks.

Q. Where did Mr. Hunter live?

A. Up on top of the hill.

Q. How many Indians lived in that village at this time?

A. I believe there was five or six Indians.

Q. They were catching fish and drying them at that time?

A. There was a very old native there, an old man and an old woman, and they would come down on the beach and would get a fish or two and take it on their back—they didn't want a great many to keep them going.

Q. You didn't ask them if they wanted any of these fish you caught?

A. No, I wasn't allowed to give them any fish from my trap.

Q. You were not allowed?

A. No, they were the company's fish.

Q. Weren't you allowed to give away these fish that you had to throw away?

(Testimony of Hayward March.)

A. If a man came and asked me for a fish, I would give him a **[60]** fish, but I wasn't allowed to give a native any quantity of fish; I put them in the scow waiting for the steamer.

Q. When you took these fish out of the net or trap, you made up your mind that if the cannery company didn't come and get them, you were going to throw them overboard?

A. I couldn't do anything else.

Q. You made no effort to handle them in any other way?

A. I had no way to do anything else with them but put them in that scow.

Q. And you kept putting them in the scow and throwing them overboard? A. Yes, sir.

Q. And you continued to do that after the 28th, although the "Reporter" wouldn't take the fish on the 28th?

A. Yes, he gave me a receipt but said he wouldn't take the fish.

Q. Did he tell you when he would be back again?

A. No.

Q. You didn't ask him?

A. I believe I asked him one time when I had conversation with the captain.

Q. Did you ask him when he would be back or didn't you? A. I wouldn't like to say I did.

Q. You don't know—now, what is the rule in Cook Inlet where the independent trappers furnish their own gear—do they get 4¢ apiece for Reds?

A. We get three cents.

(Testimony of Hayward March.)

Q. Where the independent trappers furnish their own gear, what rate have they been getting, furnishing their own gear?

A. Three cents—the company furnishes the gear.

Q. Where the independent trappers furnish their own gear, what **[61]** do they get for salmon?

A. I don't know.

Q. You never put any traps in with your own gear?

A. I never bought any gear of my own and put in a trap of my own but I used the company gear.

Q. The company in this case of yours furnished you with the gear that went on your poles and paid you three cents for the red salmon? A. Yes, sir.

Q. And twenty-five cents for the King?

A. Yes, sir.

Q. You didn't catch any humpies down there?

A. No humpies up there.

Q. Now you say this run commenced on the 24th, the run of Reds, the 24th of July? A. Yes, sir.

Q. Did you ever see the run commence that late before? A. I believe I did, one season.

Q. You don't know—you just believe?

A. I believe the run came one time on the 28th of July.

Q. You don't remember what year that was?

A. That was, I believe, in 1895, if I remember right.

Q. Now the average run there, as you testified at the trial the other day, was between the tenth and fifteenth of July, was it not?

(Testimony of Hayward March.)

A. On or about that time.

Q. Didn't you testify at the trial the other day that the boat called there on the 22d or 23d of July, and not on the 18th? A. No, sir.

Q. You don't remember testifying that way?

A. No, sir. [62]

Q. You say it did not call on the 18th?

A. I didn't say, on the 18th—I believe if I remember right—

Q. Might it not be the 22d? A. The 18th.

Q. Might it not be the 22d? How do you fix the date the 18th?

A. I kept a kind of reckoning of the time—I may be out one day or probably may be out two days, like a man would sometimes—he would mark the days of the month.

Q. You might be out three days?

A. No, not that much.

Q. Didn't you testify before that you didn't know when the boat came there previous to the 28th—the last time previous to that date?

A. I said I think the boat called on the 18th, but I ain't positively sure.

Q. What did you say at the trial the other day?

A. I don't remember rightly.

Q. What did Captain Christiansen say to you when he called there, between the 20th and 22d of July?

A. I don't remember of him calling at that time.

Mr. MUNLY.—We object, as not proper cross-examination.

Objection overruled.

(Testimony of Hayward March.)

Q. The last time he did call previous to the 28th—what did he say to you?

A. I don't remember my conversations with Captain Christiansen—one on the 28th day of July I remember and on the 8th day of August—that conversation I remember.

Q. You don't remember any other conversations?

A. No, sir.

Q. Is your memory as clear now as it was in October, 1914, when you [63] appeared before the grand jury at Seward and testified in this case?

A. That is a long time ago, probably it aint.

Q. Your memory would naturally be clearer then than it is now on matters occurring the year previous? A. I guess it would.

Q. Is it not a fact that you testified at that hearing that the fish were thrown away only on the 30th day of July and there was 2,000 of them?

A. I don't remember rightly.

Q. You wouldn't say that was not your testimony?

A. I wouldn't say it was the 30th, I might have been out two days.

Q. Didn't you testify at that time that there was one time that fish were wasted out there during the season of 1913?

A. Well, I believe I testified before the grand jury that I give a dead-reckoning that the fish I destroyed was between twelve and fourteen thousand, if I remember right, altogether, during my whole season's work.

Q. In this particular case? A. Yes, sir.

(Testimony of Hayward March.)

Q. You are sure you are not referring now to the Libby, McNeil case?

A. No, I testified in the Libby, McNeil case—I estimated my fish—

Q. You won't say you did not testify before the grand jury that you only threw over two thousand fish?

A. I was throwing over the fish right along, I had nothing else to do with them, day after day.

Q. You kept catching them and throwing them overboard day after day? A. Yes, sir. [64]

Q. And made no effort to take care of the fish in any manner?

A. I had no show to do it—I would only have been too glad if I could.

Q. You say it was not possible for you to dry these fish there on the beach, sun-dry them?

A. It was impossible.

Q. Why not?

A. I had to take my dory and go along the beach to gather a little wood for my camp and the position I was camped in, it was impossible and I didn't go to Kuskatan for that business.

Q. You went to Kuskatan to sell fish to the cannery? A. Yes, sir.

Q. And you wouldn't do anything with the fish except to sell them to the cannery?

A. I couldn't do anything—I had no barrels or anything and he mentioned nothing only for the cannery.

Q. Didn't you go to Captain Williams in 1914 and

(Testimony of Hayward March.)

ask for a trap again? A. No, sir.

Q. You appeared voluntarily before the grand jury and gave this testimony? A. No, sir.

Q. Who subpoenaed you?

A. I believe it was Mr. Cummings, a man I never saw before.

Q. Is it not a fact that you went to the district attorney voluntarily before the grand jury convened and stated these facts? A. No, sir.

Q. You made no mistake in stating that these fish were—you made no mistake, that these fish were thrown over in the fall of 1915?

A. I made no mistake as to the fish I destroyed at all. I was [65] called into the grand jury at Seward—didn't know what I was called for, until I was placed before the grand jury.

Q. You didn't know what you were called for until you were placed before the grand jury?

A. No, sir.

Q. You never had any interview with anybody regarding the destruction of these fish?

A. No, sir, only a receipt I got concerning the fish, that Captain Williams wouldn't pay for.

Q. You never talked to anybody previous to being called into the grand jury room?

A. I talked to one and another when I got home.

Q. You never talked to any of the officials previous to being called into the grand jury room?

A. No.

Mr. MUNLY.—We object to that. Objection sustained.

(Testimony of Hayward March.)

Q. Referring to Plaintiff's Exhibit "A," I will ask you to point out the place where the door was on the pot or trap as drawn on that exhibit?

A. Right here (indicating).

Q. That was in the centre of the outside line of the pot? A. Yes, sir.

Q. And what were the dimensions of that door?

A. That door was about between four and five feet.

Q. Five feet high and how many feet wide?

A. About five feet; it was a door so I could just stoop my head and get in.

Q. Would you say that the door was about five feet square? A. Between four and five feet.

Q. Square? A. Square. [66]

Q. There was nothing to prevent you from opening the door of that pot if you didn't want the fish?

A. When the water got down so I could open it, I could open it.

Q. That door was fastened in the deep water, was it? A. Yes, sir.

Q. With that door open the fish would escape out to sea again, if it was open permanently?

A. If the door was left open, naturally the fish would go out.

Mr. DONOHOE.—That will be all.

(By Mr. MUNLY.)

Q. When Captain Christiansen called on you on the 28th day of July, 1913, the first time after the red salmon run began, did he tell you that he wouldn't return, at that time? A. No, sir.

Q. Did he notify you anything of that kind?

(Testimony of Hayward March.)

A. No, sir.

Q. Did he notify you at any time that he wouldn't return? A. No. sir.

Q. Did Captain Williams ever notify you to cease fishing? A. No, sir.

Q. Now, something was said to the effect that they had no control of your trap—didn't Captain Williams when he called in June tell you to get busy, that he wanted all the fish he could get? A. Yes, sir.

Q. And he kept coming for fish right along at that time? A. Yes, sir.

Q. You said he returned a couple of times after even the 28th day of July? A. Yes, sir. [67]

Q. Some time around August 5th and August 8th?

Mr. DONOHOE.—We object to that as repetition.

By the COURT.—Yes, that has already been shown.

(By Mr. DONOHOE.)

Q. What was the size of that boat you had there at the trap? A. It was about 24 or 25 feet long.

Q. That is the company's boat—what was the size of the other? A. I never measured the boat.

Q. What was the size of the other boat you spoke of—the boat you had, independent of the company's boat?

A. That was a flat dory that Hunter built himself, a pretty large dory—it would pack quite a lot of fish.

A. How many fish?

A. I think it would pack 800 fish.

Q. How often did you fish that trap from the 24th of July on? A. What do you mean?

(Testimony of Hayward March.)

Q. How often, in each twenty-four hours, did you fish the trap?

A. Fished the trap every morning—if it was necessary for me to fish it on the next tide, I fished it.

Q. You remember you testified you fished it once each day?

A. Once each day—every morning; if it was necessary and I had the fish—

Q. Never mind that—how many times did you fish it each twenty-four hours?

A. Just the once, in the morning.

(By Mr. MUNLY.)

Q. How did you remove the fish from the trap to this dory or Columbia River boat—did you pew them out or dip them out? [68]

A. If I go out in the morning I wouldn't have to wait, for the floor to go dry, as I had a dory. I had battens so it would leave the dory about three feet from the door and when I opened the door, I got down on the floor this way (indicating) before the tide would get down to the floor. If I had a little fish and was in a hurry, I opened this door and when I opened the door, I took my scoop net and I could scoop the fish into the dory, until I got down to the floor—I didn't want to pew the fish. I could take five or six fish in the scoop net; and when the flood ran down I got down on the floor and pewed them. I could go to the scow and discharge my boat and return back to the trap again and if I got stuck on the tide, when the tide comes in again I can go and load the fish again.

Witness excused. [69]

Testimony of William J. Hunter, for the Government.

WILLIAM J. HUNTER, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. MUNLY.)

Q. What is your name and address?

A. William J. Hunter; Kenai, Cook's Inlet, Alaska.

Q. Did you live there in 1913?

A. I lived across the Inlet at that time, at Kuskatan.

Q. How far is it across the Inlet to Kenai?

A. About twenty-five miles.

Q. Were you at Kasiloff in the latter part of April, 1913? A. Yes.

Q. Who was there with you?

A. Hayward March.

Q. Did you see Captain Williams, the manager or superintendent of the Alaska Packers Association, the defendant, there? A. Yes.

Q. Did you talk with him or did Mr. March talk with him?

A. March was the man that done the talking when we met him.

Q. Were you present at that talk? A. Yes, sir.

Q. And heard it? A. Yes, sir.

Q. Relate that conversation.

A. March asked him about his chances of getting the trap gear and told him what he wanted to build

(Testimony of William J. Hunter.)

a trap, and I listened to their agreement all the way through. It was satisfactory to me.

Q. What did he say about taking the fish?

A. He said he would take the fish, all the fish we could catch.

Q. That was the only conversation you had with him? [70]

A. Well, we had a talk with him after that, but not in regard to the contract.

Q. Now, what did you do in regard to building the trap?

A. Well, we took some gear along with us in the sloop and went across and started building the trap.

Q. How much gear was furnished you?

A. I don't remember exactly how much there was; we got guy wire and net webbing, nails, etc.—what we could take by the boat.

Q. Do you remember how many coils of wire?

A. Six or eight coils, I am not positive which—we didn't take that in the boat.

Q. Do you know the price of this gear?

A. No, sir.

Q. How many hundred feet of cotton webbing did you get?

A. I don't know exactly, we had a good part of our lead made out of that—there must have been five or six hundred feet, four hundred any way, I wouldn't say exactly.

Q. Did he furnish you nails and boats?

A. Yes, sir.

Q. What boats did he furnish?

(Testimony of William J. Hunter.)

A. We had a lighter for the fish—a scow.

Q. How large a boat was that?

A. I judge it was something near forty feet long.

Q. That is the scow? A. Yes, sir.

Q. Any other boat?

A. Yes, a small boat, a double ender boat, a centre board boat that would probably carry seven or eight hundred fish.

Q. How many fish would the scow hold?

A. I don't know, we never had it anywhere near loaded. [71]

Q. Several thousand?

A. Yes, several thousand.

Q. Did you build the trap? A. Yes, sir.

Q. Did you see this plat? A. Yes, sir.

Q. Is that about the general style of the trap?

A. It is similar to the trap we had.

Q. What is it usually called?

A. A mosquito trap.

Q. Why?

A. Because it goes dry—it is dry most of the time.

Q. Did this trap go dry on the low tide?

A. Yes, once a day anyway it would go dry.

Q. How large was the pot of that trap?

A. Twenty-four feet one way I know. I don't know exactly the width of it. This way I know we had 24-foot battens but I don't remember the width of it.

Q. Was it about the same size the other way?

A. It was a little larger than it was in width.

Q. How big were the hearts of the trap?

(Testimony of William J. Hunter.)

A. Pretty near as wide, about the same width as the pot, if I remember right—maybe it projected out a little further.

Q. How deep would it go down?

A. The poles in the pot were about thirty feet long —at high tide it would go pretty well to the top of the pot—we had a webbing up near the top.

Q. How long was your lead there?

A. It was somewhere near 600 feet long, from the shore to the trap or to the heart. [72]

Q. How far out approximately was the scow anchored? A. Nearly half a mile I should judge.

Q. About half a mile out?

A. Anchored out in deep water, so the steamer could go alongside of it.

Q. How was the fish taken to the scow?

A. While I was there we took them out in the small boats.

Q. How many small boats did you have?

A. We had one belonging to me.

Q. Did you have a large boat too?

A. The cannery boat, a 24 feet boat.

Q. You had some small boats also?

A. I had one of my own and there was others we could get if we needed them.

Q. About what time did you have that trap completed?

A. I am not positive, between the 20th and 25th of May.

Q. 1913? A. Yes, sir.

Q. Did you begin to fish it right off?

(Testimony of William J. Hunter.)

A. Yes, sir.

Q. What did you fish for?

A. King salmon principally.

Q. Did the cannery boat come to get those fish?

A. Yes, sir.

Q. How often did it call?

A. Every other day, as far as I can remember.

Q. During what time?

A. During the month of June, until the latter part of June—from the 25th of May to the latter part of June.

Q. About what time did the run of king salmon slacken or cease? [73] A. The last of June.

Q. Did the boat call then?

A. It called up to the time the king salmon run was fished pretty regular.

Q. How often would it come after that?

A. I don't remember—it didn't come very often that I know of.

Q. Was there any run of fish between the ceasing of the king salmon run and the red run?

A. No, there wasn't any run to speak of.

Q. Now, when did the red run, the big run of red salmon, begin? A. The 24th of July.

Q. 1913? A. 1913.

Q. Were you there at the trap at the time?

A. Yes, sir, I was at home, I wasn't right at the trap. Mr. March went down and reported fish and I told him I thought I had better get my boat ready and go over and notify Captain Williams.

Q. What did you do?

(Testimony of William J. Hunter.)

A. I had my boat pulled up high and dry, I couldn't keep it anchored and I had to launch the boat. It took me all day of the 24th to get ready and I got it launched on the 25th and went across the Inlet and when I got to Kenai that day, on account of the head winds, I staid there and next day went to Kasiloff, the 26th and notified Captain Williams we had fish and he said he would send right over.

Q. What did he say?

A. He said he would send a boat right over after the fish.

Q. You got over to the cannery as soon as you could? A. Yes, the way the weather was.

Q. And you notified them as soon as you could? [74] A. Yes, sir.

Q. Did they say anything to you about notifying them? A. No, sir.

Q. Do you remember the time they called prior to the 24th day of July—do you remember the last time they called? A. No, not exactly.

Q. Could you fix it within a day or two?

A. I am satisfied they never called within three days anyway before that.

Q. Do you know when they called after you notified them?

A. I didn't go home on the 27th but on the evening of the 28th, I believe, I got home and my partner said the steamer had been there after fish.

Q. You were not there then? A. No.

Q. Were you there at any subsequent time that the boat called? A. After the 24th?

(Testimony of William J. Hunter.)

Q. After the 28th?

A. Yes, I was there about August 5th, somewhere along there she called and I went out to the boat.

Q. About this time were you around the cannery, from the time you left on the 24th of July, 1913, were you around the cannery much? A. No.

Q. Why?

A. You mean around the trap, don't you?

Q. Yes, I mean the trap, not the cannery.

A. I wasn't there very often. When I left I hired a native to help Mr. March and he didn't need me—there wasn't many fish after the first few days. [75]

Q. Were you there on the 29th or 30th?

A. I think I was at home on the 29th and 30th.

Q. Did you see any fish there on those two days?

A. No, I didn't pay any attention.

Q. Did any boat call there for the fish?

A. Not before the 5th or 6th, I don't think.

Q. Did you go down to see the steamer that day?

A. Yes, sir.

Q. Was there any fish ready for them?

A. We had four or five hundred fish.

Mr. DONOHOE.—We object to the introduction of any testimony from this witness, tending in any manner to prove or establish the waste or destruction of salmon, at the place named in the indictment, at a day later than the 30th day of July, 1913, being the day named in the indictment, and the further objection that the Government in this case is bound by the testimony offered through the witness March for the day on which to lay the crime, the 26th day

(Testimony of William J. Hunter.)

of July, 1913, being the first date testified to by said witness that the salmon were wasted or destroyed.

Objection overruled; defendant allowed an exception.

Q. Were you there on the 8th day of August?

A. Yes, sir.

Q. At the trap? A. Yes, sir.

Q. Did you see any salmon that day?

A. Yes, sir—we had some salmon, I think something like eight or nine hundred salmon.

Q. Was the cannery boat there? A. Yes, sir.

Q. Did they take these salmon? [76]

Same objection. Objection overruled; defendant allowed an exception.

A. No, sir.

Q. They didn't take the salmon? A. No.

Mr. MUNLY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. Where did you live in 1913?

A. I lived over at Kuskatan.

Q. You have a family there?

A. Yes, sir—I had at that time.

Q. Now, how far is that native village from the trap?

A. Four or five hundred yards I guess up to the village.

Q. How many natives were in that village along—well from the 24th of July until the early part of August?

A. I couldn't tell you the exact number, some of

(Testimony of William J. Hunter.)

them went to the cannery—there wasn't more than five or six there at any time.

Q. It is your judgment that there were five or six there?

A. There was five or six able-bodied natives there.

Q. You took no active part in the management of the trap after the early part of July, when the king salmon run stopped?

A. No, I was not there, but I would have taken part if there had been anything to work for.

Q. You took no active part in the trap management after that time?

A. No, March attended to the trap.

Q. You say a portion of this lead was made with cotton webbing? A. Yes, sir. [77]

Q. Is it not a fact that that webbing got badly perforated with holes in it and a great many fish passed through the web and you got very few fish in the trap?

A. As far as that is concerned, I don't think there was many holes the fish could go through.

Q. You say this red run commenced on the 24th?

A. Yes, sir.

Q. Could you see the trap from your house?

A. Yes, by going back on the bank a little.

Q. Your house is at the edge of this Indian village? A. Yes, sir.

Q. When was that trap fished on the 24th?

A. I am not certain what time of the day it was.

Q. You didn't fish it? A. No, sir.

Q. You didn't fish it on the 25th either?

(Testimony of William J. Hunter.)

A. No, sir.

Q. Or help fish it? A. No, sir.

Q. What time in the morning of the 25th did you leave the trap and go to Kasiloff?

A. It depends on the stage of the tide,—I don't remember what time it was; we generally left there on high water to cross the inlet.

Q. It was the tide after the trap was fished on the morning of the 25th?

A. I am not certain whether it was or not,—whether we fished that morning or not.

Q. Who did fish the trap on the 24th?

A. From what I heard I suppose Mr. March.

Q. How far were you from where they were fishing the trap? [78]

A. At least three-quarters of a mile from the trap, I couldn't see much.

Q. You saw Mr. March on the evening of the 24th?

A. Yes, sir.

Q. And he never mentioned to you how many fish he had caught? A. No, sir.

Q. You don't know how many fish he had caught?

A. No, sir.

Q. And you don't know how many fish he caught on the 25th? A. No.

Q. And you don't know how many fish he caught from that time on?

A. No, I didn't count them at all.

Q. You spoke of a dory you had?

A. Yes.

(Testimony of William J. Hunter.)

Q. Did you use that dory when you were fishing at the trap?

A. Not that I know of,—never had call for it unless it was while I was away.

Q. You never used it while you were fishing?

A. No, we never used it for king salmon fishing.

Q. You never used it to transfer the fish from the trap to the scow? A. No, I did not myself.

Q. Do you know of your own knowledge whether anybody ever used it?

A. No, sir, I left it there when I left.

Q. Did you see it used any time?

A. No, sir.

Q. In the building of this trap—you had a lot of trap poles already cut before you went to Captain Williams? A. Yes, sir.

Q. You cut those under contract with the Northwestern Fisheries [79] Company to give you webbing? A. Yes, sir.

Q. And you went to Captain Williams to get the webbing so you could use those trap poles you had cut?

A. I didn't have anything to do with the Northwestern or Captain Williams either. Mr. March made arrangements with the Northwestern to build a trap and they couldn't furnish the gear and Mr. Loughlin told me to go to Captain Williams, he thought he would give me the gear.

Q. The Northwestern decided not to furnish it?

A. They wouldn't get any gear.

Q. You were very much dissatisfied at the treat-

(Testimony of William J. Hunter.)

ment that you got at that trap in 1913 from the Packers people, were you not? A. I think I was.

Q. Now, is it not a fact that in the spring of 1914 you again went to Captain Williams and wanted him to furnish you with gear to build another trap?

A. No.

Q. You swear positively that no such conversation took place?

A. Yes, I might have asked him something about fish net but not trap gear.

Q. To refresh your memory I will ask you if some time in the month of April, 1914, at the Kasiloff cannery, you did not have a conversation with Captain Williams in words and language to this effect—you asked Captain Williams to give you web and gear to build a fish trap at West Foreland, where you had the trap the previous year? A. No.

Mr. MUNLY.—We object to that.

Mr. DONOHOE.—The purpose of this is to show the reason why this prosecution is brought. [80]

Q. Is it not a fact also that in that conversation Captain Williams offered you gill-nets and you refused the gill-nets and said you would get them from Libby, McNeil & Libby? A. No, sir.

Mr. MUNLY.—We object as not proper cross-examination.

Mr. DONOHOE.—We wish to show the feeling of the witness.

By the COURT.—You may proceed.

Q. Is it not a fact that later in the season of 1914 when some natives were fishing with gill-nets for

(Testimony of William J. Hunter.)

Captain Williams along the beach, close to where you were, you claimed that they were trespassing on your ground and sent Captain Williams word that if he didn't take those natives away from there, you would make it cost him a good deal more money than he would gain by it?

Mr. MUNLY.—We object to this as not proper cross-examination and having no bearing on the issues in this case.

Objection overruled.

A. No, sir.

Q. You never had any trouble with those natives at all?

A. I sent word to Captain Williams at the time we had the trap there—it wasn't natives, it was white men.

Q. You had no trouble with natives that were fishing for Captain Williams with gill-nets in 1914?

A. No, sir.

Q. You went before the grand jury in October, 1914? A. Yes, sir.

Q. Do you remember how many fish you testified were wasted, at that time? A. No, sir.

Q. Things were naturally more clear in your memory then *that* they [81] would be now?

A. Yes—I know we lost two thousand that we never got pay for.

Q. Didn't you testify at that time that the day the fish were wasted was the 30th day of July, 1913?

A. I don't think I did, the exact day—I may have, but I don't believe I did.

(Testimony of William J. Hunter.)

Q. What interest did you have in that trap?

A. My interest was what I could make out of the fish—that is all the interest I had.

Q. What interest did Mr. March have in it?

A. He bought half of the poles, he paid for half of the expense of the poles and of the trap—we both paid half the expense of the trap.

Q. You people built that trap according to your own ideas, without any supervision of the defendant corporation or Captain Williams?

A. It was according to March's idea—I knew nothing about the trap and never had any idea of it before.

Q. You were not an experienced fisherman at that time? A. No.

Q. You operated that trap, you and March?

A. Yes, sir.

Q. Whenever you wanted to—you had complete control of it? A. Yes, sir.

Q. Captain Williams had no representative on the ground? A. No.

Q. He had no right to open the door of the pot, if he wanted to do it?

A. I suppose he could have done it.

Q. If he came over there in force—but you people managed that trap in all its details—he never supervised it at all? [82] A. Not that I know of.

Q. You would know if he did while you were there?

A. Not while I was there—he wasn't there that I know of.

Q. It was arranged between you and March on the

(Testimony of William J. Hunter.)

one side and the defendant company on the other, when the red salmon run started, you would go over and notify him? A. No, sir.

Q. It was not so arranged? A. No.

Q. Why did you start to get ready to go over then within a few hours after you discovered the red run was on?

A. Because they hadn't been there for several days and I wanted him to know we had fish and we hadn't had fish for the last few weeks.

Q. And he hadn't been calling for the last few weeks? A. Not that I know of.

Q. And you notified him on the evening of the 26th?

A. Yes, some time during the day, whether it was evening or not I don't know—I think it was somewhere near noon, at the neap tide.

Q. If Mr. March threw away a quantity of salmon on the evening of the 26th of July, would it have been possible for the defendant company's boat to have got to that trap after you had notified Mr. Williams and before Mr. March had thrown those fish away?

Mr. MUNLY.—I object to that.

Objection overruled.

A. I don't know whether he had time or not, it depends where his boat was that he wanted to send and it depends somewhat I suppose on the tide.

Q. It is your best judgment he would not have had time? [83]

A. He had plenty of time to get there the next day.

(Testimony of William J. Hunter.)

Q. I am speaking now of the evening of the 26th?

A. I don't know exactly what time of the day it was.

Q. Tell the jury what your best judgment is?

A. How is that?

Q. Tell the jury what your best judgment is as to whether he had time to get there before March threw away those salmon or not, after you notified him on the 26th of July?

A. I think he had if the boat had been there ready to go—I left Kenai in the morning of the 26th and it is only ten miles and fair tide.

Q. Didn't you testify in the former trial of this case that it was some time in the afternoon or evening that you notified Captain Williams?

A. It might have been—I might have had to wait for the tide to get into the river.

Q. If it was some time in the afternoon when you notified him, he would have had to have a boat ready at the wharf at that time, ready to move, to get over there before the fish were thrown away?

A. He could have gotten over in four hours if he was ready to go.

Q. If he had a boat right at the wharf and if the tides were right?

A. It depends on when you can get out of that river.

Q. You can only get out when the tides are right?

A. It depends on the stage of the tide, whether it is neap tides or spring tide.

Q. You will agree it would have been nip and tuck

(Testimony of William J. Hunter.)

at least to have gotten there before the fish were thrown away?

A. I don't know what time the fish were thrown away.

Witness excused. [84]

AFTERNOON SESSION.

By the COURT.—Before the plaintiff closes its case, I think it should be required to elect on what date it will stand for a conviction in this case, on what date it will elect to try the charge of wanton destruction of fish and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of the charge when the offense relied upon for a conviction was committed, if committed at all. Now, if you will elect what date you desire to stand on, Mr. Munly—

Mr. MUNLY.—Since the Court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon.

By the COURT.—Very well.

Mr. DONOHOE.—The defendant excepts to the election made by the Government at this stage of the trial, our contention being that the election should have been made at the commencement of the trial.

Exception allowed.

Mr. MUNLY.—On account of being required to make that election, I have no further evidence to in-

troduce. The State will rest unless the witnesses are recalled for rebuttal.

Mr. DONOHOE.—At this time the defendant moves the Court to strike out of the record the testimony regarding the waste or destruction of salmon at or near the place mentioned in the indictment, at any day subsequent to the 28th day of July, 1913, on the ground that it is incompetent, irrelevant and immaterial testimony.

By the COURT.—The objection will be overruled, or rather the [85] motion will be denied and exception allowed. The jury will be instructed as to the effect of that evidence, that it is not for the purpose of proving the offense alleged to have been committed on the 28th day of July, 1913, but only as it tends to show a general course of conduct and going to explain or show the motive or intent with which the defendant acted.

Exception allowed.

GOVERNMENT RESTS.

Mr. DIMOND.—Comes now the above-named defendant, at the close of the testimony on the part of the Government, and moves this Honorable Court for an order to instruct the jury to return a verdict finding the defendant Not Guilty of the crime charged in the indictment. This motion is based upon the following grounds:

1. That it appears from all the testimony offered upon the part of the Government that if any fish or salmon were destroyed or wasted at the place and time alleged in the indictment, on the date elected by

the Government as the date on which they would stand for the time, to wit, the 28th day of July, 1913, they were destroyed or wasted by the two witnesses William J. Hunter and Hayward March and not by this defendant and that this defendant was in no wise criminally liable for the waste and destruction of such fish.

2. That it appears from all the testimony introduced by the plaintiff that the fish tray in which these fish or salmon were caught was entirely operated and controlled by the Government's witnesses, William J. Hunter and Hayward March, and that the defendant corporation had no supervision or control over the management or operation of the same. That the said two [86] Government witnesses took fish from said trap at such times and in such manner as they saw fit and that they, the said two witnesses, were not subject, in any manner, to the orders, control or direction of the defendant company; and if it were impossible for the company, for the defendant corporation, to take care of the fish caught in said trap, it had no power or control over the operation of said trap, so it could prevent the fish entering said trap, or open the door in the pot of said trap so the fish could pass through and escape and therefore the defendant corporation is in no manner criminally liable for the alleged waste or destruction of the salmon in question.

3. That the Government has wholly and utterly failed to show by its testimony that the defendant company wilfully, unlawfully or wantonly did waste or destroy any salmon whatever at the time and place

alleged in the indictment, or upon the 28th day of July, 1913.

4. That from the testimony introduced by the Government, the Government has utterly failed to establish that there was any salmon whatever destroyed or wasted, at or near the place described in the indictment, on the day alleged in the indictment.

5. That if the defendant corporation was in any manner criminally responsible for the waste and destruction of the salmon, as alleged in the indictment, the Government has utterly failed to show such responsibility and to prove the crime charged in the indictment against the defendant by any testimony, act or circumstance other than the testimony of William J. Hunter and Hayward March, and that the testimony of these two Government witnesses clearly shows that if the crime was committed, as alleged in the indictment, that they were accomplices in the [87] commission of the crime and therefore a conviction of this defendant cannot be had on the testimony of such accomplices, uncorroborated as it is by any other evidence tending to connect the defendant with the commission of the crime. The motion was by the Court denied. To which ruling of the Court defendant is allowed an exception.

DEFENSE.

Testimony of Charles H. Williams, for Defendant.

CHARLES H. WILLIAMS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination

(By Mr. DIMOND.)

Q. State your name. A. Charles H. Williams.

(Testimony of Charles H. Williams.)

Q. What position, if any, do you hold with relation to the defendant corporation, the Alaska Packers Association?

A. I was superintendent at Kasiloff that year.

Q. What year? A. 1913.

Q. Were you superintendent there in any previous years? A. Yes, sir.

Q. How many? A. I was there since 1907.

Q. At Kasiloff? A. At Kasiloff, yes, sir.

Q. How long have you been engaged in the fishing business? A. About twenty-eight years.

Q. You are very familiar with the business?

A. Fairly so.

Q. Where were you in 1914 and '15? [88]

A. In 1915 I was in Bristol Bay and in 1914 I was at Kasiloff.

Q. Do you remember meeting the Government's witnesses, William J. Hunter and Hayward March, in the spring of 1913? A. I do.

Q. What time was that?

A. Well, it was some time in the latter part of April.

Q. Where did you meet them? A. At Kasiloff.

Q. At the cannery? A. At the cannery, yes.

Q. What time of the day was it that you met them?

A. It was after supper, I think, around seven o'clock.

Q. In what part of the cannery did you meet them? A. Down at the wharf.

Q. Did you have any conversation with them?

A. Yes.

(Testimony of Charles H. Williams.)

Q. State what that conversation was.

A. Well, Hunter came to me and asked me if I could furnish them what gear would be necessary to build a trap over at Kuskatan and after talking it over I told them that I thought I could, that on account of the running of the king salmon gill-netters etc. over there it would not be inconvenient for us to attend to it.

Q. Was that all your conversation?

A. When we were talking it over I told them I would furnish them the gear but that it would be necessary for them, in case we were oversupplied with fish, or for any reason our boats, from stress of weather, couldn't call there, it would be necessary for them to take care of the fish, so it wouldn't spoil and they told me it was an understood thing, they knew that from [89] olden times.

Q. At that time did you have any reason to believe they could not take care of their surplus fish?

A. No, I did not.

Q. With whom did you hold this conversation?

A. Mr. Hunter.

Q. Was March present at any time during that conversation?

A. Yes, I think he was on the wharf at the same time and we were talking it over together, the three of us; later on, after I promised Hunter that I would do it, then March came up.

Q. Did he assent to this contract in any manner?

A. I think so—I never spoke to March, whether he assented to it or not—I spoke to Hunter.

(Testimony of Charles H. Williams.)

Q. You heard March's testimony that he had the conversation with you? A. Yes, I did.

Q. You say he is mistaken in that respect?

A. In that respect he is, yes.

Q. How do you recollect so distinctly that you made the contract with Hunter?

A. Well, I recollect that I wouldn't have made a contract with March.

Q. Why?

A. I don't consider him very reliable—he worked for me before and didn't prove very satisfactory.

Q. How is the name carried on your books, March or Hunter or March & Hunter or Hunter & March?

A. Hunter & March—the one that makes the agreement, we always carry him first on the books.

Q. Did you take any fish caught by Hunter & March after that time? [90]

A. Yes, whenever they had any fish we took them.

Q. How long did you continue to take fish?

A. All through the season.

Q. Do you recollect Hunter's coming over to the cannery in the month of July, 1913?

A. I think that Hunter was there—it is quite a long while ago but I think that he must have been there.

Q. Do you recollect the day? A. No, I do not.

Q. When he testified he came over on the 26th, would you say that was correct?

A. I couldn't contradict him at all.

Q. As far as you know?

(Testimony of Charles H. Williams.)

A. As far as I know that is the right date, I don't know any different.

Q. What did Mr. Hunter say to you on that occasion about fish?

A. Well, as far as I know, he told me that there was some fish over there.

Q. What did you do then, if anything?

A. I told him we would send a boat over as soon as we could.

Q. How soon did you send the boat over?

A. On the next tide, as far as I recollect.

Q. How many hours after Hunter was there did you start the boat? A. I couldn't say.

Q. About how long? A. I couldn't tell you.

Q. Are you sure you sent it on the next tide?

A. I sent it on the next tide, if the boat was there—I don't recollect if the boat was there; if it was there it went out on the next tide.

Q. How many power boats did you have in connection with the cannery? [91]

A. I had four pretty good-sized boats and one a little smaller—five power boats.

Q. And they were all used to transfer the fish from the different traps and places where they were caught to the cannery?

A. Yes, they would tow the lighters.

Q. Are you positive that you sent this boat at the earliest moment you could after Hunter notified you they had fish? A. I am.

Q. Did you get any fish at that time?

A. No, we got no fish.

(Testimony of Charles H. Williams.)

Q. Why, if you know?

A. I asked the captain of the boat and he said the fish were spoiled.

Q. That is all you know about it?

A. That is all I know about it.

Q. You have no personal knowledge?

A. No, I have not.

Mr. MUNLY.—I move to strike that out.

By the COURT.—Yes, confine your testimony, Captain, to matters you have personal knowledge of.

Q. Do you know when the boat went over there again to Hunter & March's trap?

A. No, I couldn't say the dates.

Q. Did you have any boat on that particular run, that was supposed to call at that particular trap?

A. The "Reporter" is the boat that had the run on that side.

Q. Did you call at any other place except this trap, I mean generally speaking?

A. No, generally speaking, I did not, but I can't recollect if I [92] did call at any other trap during that time—it is a little too long; I could guess at it but couldn't say definitely.

A. Didn't the "Reporter" have a general run—didn't it have a usual course? A. Yes, sir.

Q. Where did it call when it made its usual run?

A. It called at Kalgin Island.

Q. Point it out on the map.

A. This little island running down here (indicating on map). The cannery is here; it ran over here to Kalgin Island, then to the Hunter & March trap and

(Testimony of Charles H. Williams.)

then to the Howard & Pound trap and then back to the cannery.

Q. Who was the captain of this "Reporter"?

A. Captain Christiansen.

Q. And he usually made the run in the manner you have stated?

A. Yes, he usually made that run, if the weather was so he could.

Q. How long did it take him to make it?

A. Well, it would take around about eighteen hours, if the weather was fair and if the weather was bad, it might take him twenty-four hours.

Q. How often did he make the run?

A. He was supposed to make the run as often as he could,—that would be about every other day, once in forty-eight hours.

Mr. MUNLY.—I object to this line of testimony unless he shows that he knows it from personal knowledge.

By the COURT.—No, he is telling what the usual run was, not that the boat actually did so. Objection overruled.

Q. When did the run of king salmon cease in 1913?

A. It finished up the latter part of June.

Q. When did the run of red salmon begin? [93]

A. It began that season on the 25th of July.

Q. How do you recollect this particular date?

A. Because it was the latest date we ever had the run of red salmon up there.

Q. When does the run of king salmon usually begin?

(Testimony of Charles H. Williams.)

A. It began the first part of June—we generally get ready to start fishing the first part of June, send the gill-nets over.

Q. I meant red salmon, not king—when does the run of red salmon usually begin?

A. As a general rule they start in around the 15th, up to the 18th or 20th.

Q. And you say the day on which they began to run that year, the 25th, was the latest you have knowledge of?

A. Yes,—we didn't expect any that year, it got too late.

Q. Now, with reference to the run of salmon, do they always run in the same place in Cook Inlet each year?

A. No, altogether different—a trap that will catch fish this year might not catch any next year or the year after—it is altogether different; one year they are on one side of the Inlet and come in below Anchor Point and probably the next year come in up by Kenai.

Q. Would the fact that you got fish in your traps on the east side of Cook Inlet in 1913 on the 25th of July be any sign that Hunter & March had any fish in their trap at that time?

A. Not at all—no reason at all.

Mr. MUNLY.—We object to that.

Objection sustained.

Q. How many traps have you up there or did you have in 1913? A. We had about eleven traps.

Q. Where were they located, on which side of the

(Testimony of Charles H. Williams.)

inlet? [94] A. All on the eastern side.

Q. Didn't you have any on the west side?

A. No, I had no trap myself; Hunter & March had one and Howard & Pound had one, but those were their traps, they were not ours. I had one on Kalgin Island—that was our trap.

Q. You say that Howard & Pound had a trap on the west side of the Inlet? A. Yes, sir.

Q. Where was that located?

A. That was located below *Tyonek,* a place called Goose Bay. It was at Goose Bay where Howard & Pound had their trap.

By the COURT.—That is not in Knik Arm?

A. No, it is on the opposite side of the Inlet.

Q. How far is the Howard & Pound trap from Kasiloff?

A. Well, around twenty-eight or thirty miles.

Q. How far is the Hunter & March trap from the cannery at Kasiloff?

A. About ten or twelve miles further up.

Q. What kind of a contract did you have with Howard & Pound?

A. The same as I had with Hunter & March.

Q. And did they take care of the surplus fish that you didn't use? A. Yes, they took care of it.

Q. How do you know?

A. No, I don't—no doubt salted it—I don't know.

Mr. MUNLY.—We object to that.

Objection sustained—answer stricken.

Q. Did you have any trouble with Hunter in 1914?

(Testimony of Charles H. Williams.)

Mr. MUNLY.—We object to that.

Objection overruled.

A. Well, I had this much trouble with Hunter—he told the captain [95] of the steamer that he wanted us to take our men away from where he was fishing with gill-net during the king salmon season.

Q. Who were these men?

A. They were natives.

Q. Hired people?

A. They were none of our regular men—they were all Alaskans.

Q. Did he make any threats against you that you know of?

Mr. MUNLY.—We object to that.

Objection overuled.

Q. Do you know whether Mr. Hunter made any threats against you, if you failed to comply with his wishes in that respect?

A. He never said anything to me personally about it, but he sent word over to take the men away.

Q. Did Hunter ask you for gear for a trap in 1914?

A. Yes, they came and asked me for gear in 1914.

Q. And you refused? A. I refused, yes.

Q. What did you do?

A. I told him I wouldn't give them any gear, I told them I would give them gill-nets if they wanted to go gill-netting and they told me they could get all the gill-nets they wanted from Libby, McNeil and didn't want any.

Q. Did you or any other officers of the Alaska

(Testimony of Charles H. Williams.)

Packers Association have any control over Hunter & March's trap in 1913?

A. No, no control over the trap, we had nobody there to look out for it; they looked out for it themselves—we had nothing to do with it at all.

Q. Did you at any time ever give them any directions how they should run the trap, or when they should fish or anything of [96] that nature?

A. Never.

Q. And they, as far as you know, did just as they pleased with the trap, is that true? A. Sure.

Mr. DIMOND.—That is all.

Cross-examination.

(By Mr. MUNLY.)

Q. You say you had this conversation with Hunter alone? A. Yes, sir.

Q. You said you did not have a conversation with March? A. No, sir.

Q. You testified in this case the other day, did you?

A. Yes.

Q. Was that Thursday of Friday?

A. I don't quite recollect what day it was.

Q. Well, it was either Thursday or Friday, anyway. Did you ever mention that you had not any confidence in Mr. March in your testimony at that time?

A. No, I don't think that was brought out.

Q. Isn't this an after reflection?

A. No, not at all.

Q. It wasn't brought out before—you didn't bring it out before? A. No, it was not brought out.

(Testimony of Charles H. Williams.)

Q. Did you say in your previous testimony, on Thursday or Friday, that they would have to look after their own fish? A. If it was asked, I did.

Q. I am asking you now, did you say that?

A. If that question was asked I answered just that way. [97]

Q. Didn't you say the other day that you didn't give them any instructions whatever about taking care of the surplus fish—isn't that what you said?

A. I told them that everybody's contract was made the same—all our contracts were made the same.

Q. In other words, this is what you have thought out since that time, on account of the previous testimony.

Mr. DONOHOE.—We object to that as argumentative. A. Not at all.

Q. Now, you say you haven't much recollection of Hunter's coming there to you on the 26th of July?

A. My recollection is not very clear that Hunter did come or what time he did come.

Q. You don't know anything about when the boat went out?

A. I know when Hunter came there, as soon as that boat could get over there, it went over; as soon as I was told there was fish over there, our boat went over.

Q. How many traps did you say you have up and down the inlet? A. We have about eleven.

Q. And you have these two independent traps on the east side? A. On the west side.

Q. Yes, the west side. And the Kalgin Island trap which is practically on the west side?

(Testimony of Charles H. Williams.)

A. Yes, that is west.

Q. That is your own? A. Yes.

Q. That would be twelve traps of your own?

A. No, eleven—the Kalgin Island is included.

Q. How far north is your upper trap, your northern trap, on the west side, from the one that is furthermost south on the eastern side—how much further is your highest trap up from the [98] lowest one, on the east coast?

A. I couldn't say, unless I measured it, but I think somewhere around sixty-five or seventy miles.

Q. How far is Kalgin Island from your cannery?

A. I think about twelve or fourteen miles.

Q. How far is it to Kuskatan, where this trap of March's, is?

A. About twenty-eight or thirty miles.

Q. From the cannery? A. From the cannery.

Q. The way you went?

A. I went from Kalgin—that would be about four and a half miles.

Q. And how far is the Howard & Pound trap from that?

A. I think that would be somewhere around twelve miles, something like that.

Q. How far altogether around that way, forty or fifty miles, 45?

A. About forty miles, something like that.

Q. How far was it then back to the cannery? Do they come back that way to the cannery?

A. It would be a little shorter distance to go straight over, you cut off some.

(Testimony of Charles H. Williams.)

Q. How long does it take them to go that distance?

A. It takes about eighteen to twenty hours or maybe twenty-four hours to make the run—they should be able to make it in eighteen, if the weather is anywhere decent.

Q. When the run of red fish comes in first, as a matter of fact you are a very busy man?

A. We haven't been very busy, I am sorry to say.

Q. I mean, when the run of red salmon is on?

A. Yes, we are busy, but it is very seldom we are anywhere near our capacity. [99]

Q. Aren't you a very busy man yourself?

A. No, I am not very busy.

Q. How long does the red run last?

A. Well, they may last three or four days, and they may run ten days.

Q. Isn't that the time when you hope to reap your rich harvest? A. You bet—that is right.

Q. What is the proportion of your red fish compared with the rest of the pack?

A. The red fish is way in the majority.

Q. What is your capacity?

A. We are fitted for 65,000 or 65 to 70,000.

Q. And what would be the proportion to the other?

A. That would be about 40,000 red out of that.

Q. Two-thirds? A. Yes, sir.

Q. You have two or three months to get the other fish and these 40,000 you have to get in three or four days?

A. No, we get the red fish all the season because the run is not very heavy.

(Testimony of Charles H. Williams.)

Q. Isn't it a very few you get most of the time?

A. Sometimes quite a few, sometimes pretty good—sometimes a few.

Q. How was it in 1913?

A. We had quite a few fish coming in the Inlet, on the eastern shore of the Inlet.

Q. Your recollection is pretty good now?

A. No, it is not very good.

Q. Now, is it not a fact that you did not know about the time the boats went out at all, they went out at random?

A. They have their regular runs, come in on one tide and go out on the next. [100]

Q. Do you know the day the boat went over to Kuskutan in July, before the red run came on?

A. It was supposed to be on that run.

Q. Do you know, of your own personal knowledge?

A. Well, that is all I can recollect—I don't know that the boat was broken down or that he made any other runs.

Q. Do you know about the run—do you know when he went over there from April to July 28th?

A. No, I couldn't state any date.

Q. You don't know whether it went over on July 28th? A. I do not.

Q. Or afterwards?

A. No, I do not, any date—he went over there, but what date I don't know.

Q. Now, you have eleven of your own traps to attend to when this big rush of red salmon comes on?

A. Yes.

(Testimony of Charles H. Williams.)

Q. When this tide of salmon comes in? A. Yes.

Q. Didn't you pay more attention to your own traps than you pay to any other trap?

A. Well, the boats are on that run and they attend to these traps—wherever we have fish we fish them.

Q. Don't you know the "Reporter" was taking fish from your other traps?

A. He wouldn't be sent to any other trap unless—

Q. Do you know he was not? A. No, I do not.

Q. What did you furnish in the way of gear?

A. Well, we furnished guy wire.

Q. How much? **[101]**

A. I could give you about the average that would be required for that kind of a trap.

The COURT.—The testimony of your own witness is uncontradicted here in that regard—that might save time.

Mr. MUNLY.—I want to get at the cost; he says he had no interest in this trap.

The COURT.—You might ask him what the total value of the material furnished was, if he knows.

Q. Do you know the cost? A. I do not.

Q. You have the management of that cannery?

A. I have.

Q. You said you were not very busy a while ago—didn't you look after the books, too?

A. It is a small item.

Q. Don't you know that each coil of this wire—if there were eight coils furnished that it would cost in the open market eighty or ninety dollars, this woven web for trap? A. I think it would.

(Testimony of Charles H. Williams.)

Q. Don't you know that the cost of the guy wire would be upwards, or about the same thing?

A. I don't think it would be quite as high as the netting—it takes about four coils of guy wire for a little trap of that kind.

Q. How about the cost of the webbing?

A. The webbing was very old webbing, such as we couldn't use any further in our traps.

Q. Do you recollect that? You didn't furnish it?

A. Yes, I knew that to be a fact.

Q. How do you know?

A. Because that was the instructions, they couldn't give anything else. **[102]**

Q. You didn't furnish it at all, of your own personal knowledge?

A. I didn't go and put it in the scow.

Q. Wasn't the cost, at least, over $200? Of the material that was furnished, nails and wire and all the material? A. It might run up to $200.

Q. So you had some interest in it?

A. That is an awful small item in a big cannery.

Q. But you had an interest in that trap to that extent?

A. We gave this gear to these men, turned it over to them—it was theirs when they got it.

Q. And they were to turn over all their fish to you?

A. They were to turn the fish over to me.

Q. Not to the Northwestern or any other one?

A. No, I don't think so.

Q. They couldn't turn their fish over to any other cannery?

(Testimony of Charles H. Williams.)

A. No, they could take care of it, turn it over to themselves.

Q. Did you see that receipt of Captain Christiansen—did you see about some receipt that Captain Christiansen told about, a record of that receipt, for two thousand fish?

A. I didn't see any receipt, no.

Q. Did Captain Christiansen tell you that there was 2,000 fish there on the 28th day of July, 1913?

A. I have no recollection of his telling about that.

Q. Did he tell you that there was some fish over there that he didn't take, over to the cannery?

A. Well, I asked him when he came—he didn't have any fish, and I asked him how it was he didn't have any fish and he said the fish was spoiled—that is all the conversation I had with him about it.

Q. Did he state the number?

A. He didn't state the number. [103]

Q. Did he say anything about a receipt? A. No.

Q. Did he tell you about any subsequent visits there, that is, later on—did he tell you about visiting the trap again?

Mr. DONOHOE.—We object to that as not proper cross-examination and as seeking to establish a waste of fish at a date subsequent to the date elected by the Government as the date on which they will stand.

Objection overruled. Defendant allowed an exception.

Q. Did he tell you there was any other fish destroyed there?

A. No, he didn't tell me anything about any fish

(Testimony of Charles H. Williams.)

being destroyed there.

Q. Did he tell you he had any fish at that trap at Kuskatan after the 28th of July?

Same objection. Objection overruled. Defendant allowed an exception to the ruling.

A. It was his regular run—if he went out with the steamer he must make that run.

Q. I mean, of your personal knowledge?

A. No, I was not on the boat, I couldn't say; I only got the captain's word for it, that he made that run.

Q. As a matter of fact, didn't you pay a couple of visits to this trap?

A. I was over there and stopped once and once passed through there—there was nothing doing at that time—they had no fish and nobody came out.

Q. That wasn't during the run?

A. It was during the fishing season.

Q. It was not during the red run?

A. It was some time in July. [104]

Q. What part of July?

A. I should say the middle of July.

Q. Didn't you tell them at that time to get busy and get all the fish they could for you?

A. That was during the king salmon season; the trap broke down at that time.

Q. Did you ever say to them at any time or make any arrangement with them, about drying or smoking or otherwise using any surplus salmon?

A. Just to take care of it—just to take care of it, that is the only words I used—you have to take care of the fish yourselves, any fish we cannot take.

(Testimony of Charles H. Williams.)

Q. Did you say anything about that before?

A. I don't think you asked me.

Q. You never said a word about drying or smoking?

A. No, I didn't mention that.

Q. When you were over there at that time—did you make any inquiries as to whether they had any facilities or means or opportunities for doing that?

A. No, I did not—I took their word for it that they would do it.

Q. You didn't make any inquiry at all as to when the red fish would come on? A. I did not.

Q. You let them run their trap as they pleased?

A. Yes, I had no jurisdiction over that.

(By Mr. DIMOND.)

Q. Did you ever have an over-supply of fish at the cannery, greater than your capacity, during the summer of 1913? A. No. [105]

Q. Did you ever at any time, either on the 28th day of April, or at any other date, tell Hunter and March that you would take all the fish they would catch at that trap? A. No.

Q. Do you recollect the date that you were over at the trap? A. No, I do not.

Q. Are you sure it was in the salmon season?

A. Yes, sir.

Q. And that is the day you made the remark to them?

A. Yes, their trap was a little out of order and I told them they had better get busy, if they wanted to make any money.

Witness excused. [106]

Testimony of O. S. Christiansen, for Defendant.

O. S. CHRISTIANSEN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DIMOND.)

Q. What is your name? A. O. S. Christiansen.

Q. What is your occupation?

A. Seaman, sailor.

Q. Where were you in 1913, the summer of 1913?

A. I was master of the steamer "Reporter" in Cook Inlet.

Q. In whose employ were you?

A. For the Alaska Packers Association.

Q. The Alaska Packers Association?

A. Yes, sir.

Q. What were your duties at that time?

A. My duty was to pilot the boat around, tow lighters and bring the men around to their stations and furnish them with the materials and one thing and another, and bring fish to the cannery.

Q. Did you pack fish in the boat itself or tow lighters?

A. Sometimes we towed lighters, but if there were not many fish, we packed them in the boat.

Q. You are familiar with this trap operated by March and Hunter in 1913, at Kuskatan?

A. Yes, sir.

Q. Did you call there frequently?

A. Yes, we called there every second day.

Q. Every second day?

A. Yes, when we started in to fish.

(Testimony of O. S. Christiansen.)

Q. Do you recollect how many times you were there during the month of July, previous to the 20th of July? A. No, I do not. [107]

Q. Do you know whether you called every second day in July or not?

A. No, I didn't call every second day in July.

Q. Why not?

A. Well, for some reason—there was no fish in the first part of July.

Q. The king salmon season was over at that time?

A. Yes, sir.

Q. And the reds had not commenced to run?

A. No.

Q. When were you at this trap in July previous to the 28th, before the 28th, when were you at this particular trap, about what time, if you don't know the exact date?

A. Well, it might be somewhere around the 18th.

Q. Whom did you see there at that time, Hunter or March, or both of them?

A. It seems to me they were both there at that time,—I think.

Q. Did you have any conversation with them at that time? A. No, not much.

Q. When were you at the trap next after that, about what time?

A. Well, it must have been on the 27th of July.

Q. Are you sure of that?

A. Well, I am not sure, I don't recollect the date exactly.

Q. You couldn't tell, it might be earlier or later?

(Testimony of O. S. Christiansen.)

A. Yes, but it was about that time.

Q. How did you come to go over there?

A. Well, we got notice at the cannery that there was some fish over there.

Q. Who was at the trap at that time or whom did you see there?

A. When I came there Charley March was there.

Q. Was there any fish there?

A. Well, they had about two thousand on the scow.

[108]

Q. How could you tell there was 2,000?

A. We can pretty nearly tell and that is what Charley March said, there was two thousand.

Q. Did you take those fish?

A. No, I couldn't take them, because they were too old.

Q. How could you tell they were too old?

A. Well, the smell was enough for me.

Q. Did you examine the fish? Did you go close to the scow?

A. Yes, I went close to the scow and looked at them.

Q. How long have you been up in and around Cook Inlet engaged in fishing or in connection with the fish industry? A. Twenty-nine years.

Q. You have been in the fish business all that time, in some capacity or other?

A. Yes, the last fifteen years I have been master of the steamer "Reporter."

Q. How old would you say those fish were that you

(Testimony of O. S. Christiansen.)

observed, those two thousand that you observed in the scow?

Mr. MUNLY.—We object to that, testifying about the age of the fish.

The COURT.—He can give his opinion.

The WITNESS.—According to stories I heard they were about—

The COURT.—That is not the question.

The WITNESS.—They were over two days old.

Mr. DIMOND.—That is all. [109]

Cross-examination.

(By Mr. MUNLY.)

Q. Now, Captain, you started in on the "Reporter" during the month of May to go to that trap at Kuskatan, to call at that trap, every second day?

A. Yes, every second day.

Q. And you continued that for how long?

A. We continued that up to about the first part of July, some time.

Q. You took all the salmon they had there?

A. Yes, sir.

Q. Glad to get all the salmon you could?

A. Yes, sir.

Q. Now you say the time previous to July 28th that you called was about July 18th—that you called at the trap? A. Yes.

Q. As an old fisherman up there, didn't you expect the run of fish to be coming at any time?

A. Yes, they were expected to come at any time, but in general they come first on the eastern shore, before they get up there.

(Testimony of O. S. Christiansen.)

Q. When the run began, didn't you run the "Reporter" down to the other traps, the company's traps, and take fish from the other traps? A. No.

Q. Didn't you visit any other trap? A. I did.

Q. What traps did you visit?

A. Because one of the boats broke down.

Q. And so you were put on the run for the other traps?

A. Well, I had to do it—I had to go to the traps for the cannery.

Q. That is the reason you could not go over there until the 28th, to the other trap, the Kuskatan trap?

[110] A. Yes, sir.

Q. It was the 28th you got there? That is the way you testified on your previous testimony?

A. Yes, sir.

Q. There was 2,000 fish there that day?

A. Yes, sir.

Q. You gave your receipt for 2,000 fish?

A. I did.

Q. How close did you get to those fish?

A. Well, I was alongside the scow with the steamer.

Q. How close to the scow did you get?

A. Alongside the scow.

Q. But you took no fish away? A. No.

Q. As a matter of fact, when the red fish run—don't they run every day?

A. Yes, they run every day.

Q. There ought to have been some other fish there?

A. They didn't have any other fish at that time—

(Testimony of O. S. Christiansen.)

of course if they had fish I would have taken them.

Q. But you didn't make any close examination?

A. I didn't go down in the scow,—of course not.

Q. Didn't March & Hunter say they wanted to sell all their fish? A. Yes.

Q. Weren't they anxious to make money?

A. They were.

Q. Anxious to sell their fish? A. Yes.

Q. But you wouldn't take the fish from them?

A. That is why I gave them that receipt. I didn't have an order from Superintendent Williams to do it; he said, Go over there [111] and get the good fish and receipt for it, but don't bring any bad ones.

Q. What was the next visit you paid—did you pay a visit the next day or the next—when did you go over to the trap after the 28th?

A. I don't remember now what date it was.

Q. Was it the fifth or the third or when?

Mr. DONOHOE.—We object to that because it is not cross-examination. The witness testified on direct examination there was nothing occurred after the 28th.

Objection overruled. Defendant excepts.

Q. You don't know when you went over there the next time?

A. No, I don't remember the date—it was some days afterwards,—how many days it was I don't know.

Q. In the meantime weren't you still taking fish from the other traps belonging to the company, on the "Reporter"?

(Testimony of O. S. Christiansen.)

A. Yes, we took fish from the Kalgin Island trap and went up I think to the Howard & Pound trap.

Q. Didn't you take some from the upper trap belonging to the company, the trap that is way up north there, on the eastern side?

A. Yes, we went by there sometimes—that is what we call Natisko; we went there sometimes, not all the time.

Q. Didn't you take some sometimes?

A. Yes, sir.

Q. Didn't you take from some of the other company traps besides that?

A. No, not down on the eastern shore, because there were other boats running there.

Q. Now, Captain, when was the last time that you called at the trap? **[112]**

Mr. DONOHOE.—We object to that question on the ground that it is not proper cross-examination and on the further ground that it is tending to establish a liability against this company or establish an alleged collateral crime, after the date on which the Government has elected to stand in this indictment.

Objection overruled. Defendant allowed an exception.

Q. Do you remember the last time you visited the trap at Kuskatan?

A. The last time at Kuskatan—you mean for fish?

Q. Yes.

A. I don't remember the date, when it was, but I know they didn't have many any way and they figured on breaking up the trap.

(Testimony of O. S. Christiansen.)

Q. Didn't they have several hundred fish there?

A. Yes, there was several hundred, something like that.

Q. And you didn't take them?

A. We took them if they were good, sure.

Q. Did you take any that time—did you take any the last time?

A. I have forgotten now—if they had any I took them all right, if they were good.

(By Mr. DIMOND.)

Q. When you were at the trap and these 2,000 fish were there that you spoke of, who was at the trap?

A. There was Charley March.

Q. Was there any native there?

A. No, I didn't notice them.

Q. Did you have any conversation with Charley March when you were there at this time and found those 2,000 fish there?

A. Not very much—he asked me what he was going to do and I said [113] I don't know myself—I gave him the receipt and I said it might be remedied afterwards; what he was going to do with the fish I said I didn't know.

Q. Did you have any other conversation with him?

A. No; I didn't stay there very long.

Q. (By Mr. MUNLY.) Did you notify him at that time not to fish any more?

A. No, I couldn't do that.

Q. (By Mr. DIMOND.) Did Mr. March say anything about whether he was going to fish any more or not?

(Testimony of O. S. Christiansen.)

A. Well, he says, "I don't know if it is much use to fish any longer if it keeps on going this way," but he keeps on fishing a little anyway.

Witness excused. [114]

Testimony of James S. Lyman, for Defendant.

JAMES S. LYMAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. James S. Lyman.

Q. You occupy a government position in Alaska?

A. I am the representative of the Bureau of Fisheries.

Q. How long have you been in that capacity?

A. I have been associated with the Bureau since 1911, but in the capacity I am now in, since 1914.

Q. It is part of your duty to visit the several fish-traps in this section of the Territory and generally overlook the fishing business here?

A. It has been and is at present, where traps are found.

Q. You have made somewhat a study of curing fish and of drying and other means of preserving fish, and also by observation?

A. I would hardly say I had made a study of it—it has only come to hand in the course of the last year, in observations I was carrying on in the Interior of Alaska, the Copper River Valley—and at that time I had occasion to observe the methods of drying.

(Testimony of James S. Lyman.)

Q. You heard the testimony here, I believe, of Mr. March that he had two thousand fish in the scow out here at Kuskatan on the 28th day of July, 1913—I will ask you, from your experience, what is your opinion as to whether or not March and Hunter could have sun-dried those salmon so as to cure them for dog feed?

Mr. MUNLY.—We object to that as having no bearing whatever on this case—it is not shown to be part of the agreement.

By the COURT.—It is a question for the jury.

Objection overruled. Plaintiff allowed an exception. [115]

A. Well, that would depend upon varying circumstances. Taking their testimony as evidence, it might be said that there was no room for the drying of those fish; not being acquainted with the spot in question, I wouldn't be able to answer that question thoroughly. As to the possibilities of drying salmon where there is space and means provided, I presume it would be possible, but as to this particular case, I wouldn't hardly be in position to testify.

Q. From your knowledge of the situation what would you say as to the extent of preparations necessary to sun-dry those fish?

Mr. MUNLY.—We object to that—they have laid no foundation to show that this witness has any knowledge whatever of the conditions up there.

By the COURT.—He may answer.

A. I am not really in a position to testify on that particular point, because there are several proposi-

(Testimony of James S. Lyman.)

tions that enter into it, that would have to be known by actual knowledge; in other words, you would have to know what exact preparations were at hand for facilitating the work.

Q. What would be the preparations necessary to sun-dry salmon?

A. Well ordinarily, if you had a beach and a place to build a rack and the salmon were right there, the preparations would be rather simple. In this particular case it would all depend on whether they had proper boats to get the salmon and what quantity of salmon they had to dry.

Q. Basing it on two thousand salmon?

A. As I said before, I would have to know the conditions that obtained there before I could testify, because I could qualify in no way as an expert in this particular business.

Q. I will ask you if on last Saturday afternoon, in the Buffet Saloon, in the Town of Valdez, you didn't tell me that you [116] had listened to the testimony of Hunter and March in the previous trial and you were fully convinced that they could easily have taken care of those salmon by drying, or words to that effect?

Mr. MUNLY.—We object to that—it is an attempt to impeach their own witness.

Objection sustained. Defendant allowed an exception.

(By Mr. MUNLY.)

Q. You don't know anything about the conditions at Kuskatan at all? A. Not at all.

(Testimony of James S. Lyman.)

Q. Have you ever visited Kuskatan?

A. Never visited there.

Witness excused.

DEFENDANT RESTS.

Mr. DIMOND.—At this time we wish to renew our motion for an instructed verdict of Not Guilty, on the same grounds as originally moved, at the close of the Government's case.

Motion denied. Defendant excepts.

After argument of counsel the Court delivered his instructions to the jury, as follows: [117]

Instructions of the Court.

Gentlemen of the Jury:

In this case the defendant, the Alaska Packers Association, a corporation, is charged by the indictment with wantonly wasting and destroying salmon in the waters of Cook Inlet, in the Third Division of Alaska, on the 30th day of July, 1913.

2.

Section 266 of the Compiled Laws of Alaska provides that it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon, or other food fishes, taken or caught in any of the waters of Alaska.

You are instructed that while intent is an essential ingredient of every crime and that no crime can be committed without the intent so to do, still everyone is presumed to know and to intend the necessary, natural and probable consequences of his acts.

The word "Wantonly" as used in this statute means without excuse or justification; having a reck-

less disregard of consequences; heedless of results and the rights of others.

The words "waste" and "destroy" are used in this statute in their ordinary significance—to suffer or permit to go to waste and be destroyed; not saved or put to any good or useful purpose.

3.

Section 265, Compiled Laws of Alaska, reads as follows:

It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed. [118]

4.

It is admitted that the defendant is a corporation organized under the laws of the State of California, and you are instructed that a corporation acts only through some officer, agent, representative or person, and you are further instructed that the witness Williams is admitted to be the superintendent of said defendant corporation, and as such, his acts and agreements in relation to the trap and fish testified to in this case are binding on said defendant company.

At the request of the defendant I give you the four instructions following:

Defendant's Instruction A.

The indictment in this case charges the defendant with destroying a large number of salmon. Now you are instructed that before the defendant can be convicted of the charge it must be proven to your satisfaction, beyond all reasonable doubt, that the defendant unlawfully and wantonly wasted or de-

stroyed a large number of salmon, that is, a considerable number. To sustain a conviction of the defendant it is not sufficient to prove that some salmon were wasted or destroyed, such as might incidentally be wasted and destroyed in the operation of a large cannery.

Defendant's Instruction B.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

You are instructed that if you believe from the evidence that at the time the defendant corporation supplied Hunter and March with a portion of the fishing gear for the construction of [119] the trap at West Foreland, that Captain Williams acting on behalf of said corporation stated to Hunter that in case the company did not take all of the fish that would be caught in the trap that he, Hunter, must take care of the fish, either by salting or drying them and not permit them to spoil, then you must find the defendant not guilty.

Defendant's Instruction C.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

I instruct you that if you believe from the evidence that at the time the defendant corporation delivered to Hunter a portion of the gear used in connection with the fishing-trap in question that it was understood between Captain Williams, acting for the defendant corporation, and William Hunter, that in case the company's boat did not call for any fish within the time allowed by law for canning fish after they were taken from the water, that Hunter and

March were to dry or salt the fish for their own account, then you must find the defendant Not Guilty.

As I have stated, these last two instructions that I have read to you are to be read in connection with Instruction Number 8 as I will read it to you hereafter.

Defendant's Instruction D.

The defendant in this case is a corporation, but you are cautioned not to allow such fact to prejudice or bias you in this case either in favor of or against the defendant. You are instructed to consider the evidence in this case in the same manner as you would if the defendant were an individual. [120]

5.

The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless

or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged offense, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth. [121]

7.

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant company made an agreement or arrangement with the witness March, or March and Hunter, to call for and take all salmon caught in said trap near Kuskatan, during the fishing season of 1913, and that said defendant recklessly and wantonly (as defined to you in these instructions) failed and neglected to call for or take said fish, and thereby suffered and permitted said salmon to be wasted and destroyed, then you should find the defendant guilty as charged in the indictment.

If, however, you believe from the evidence that the defendant company did not agree to call for all the salmon during the fishing season of 1913, at said trap near Kuskatan, and take the same from the witness March, or March and Hunter, then you should find the defendant Not Guilty.

The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:

8.

A cannery company may lawfully enter into a contract with any person to take all or any part of the salmon caught in a trap or otherwise by such person, provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the [122] run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence.

9.

In this case, as in all criminal cases, the jury and the Judge of the court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to

decide and determine the questions of fact arising from the evidence. It is the duty of the Judge of this court to decide the questions of law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitary, but to be exercised with legal discretion and in subordination to the rules of evidence.

10.

Your duty to society and this defendant obligates each of you to give your earnest and careful attention and consideration to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted. [123] Under the solemnity of your oaths as jurors you must consider all of the evidence in the case under the law given to you by the Court in these ininstructions; and upon the law and evidence you must reach, if you can, a just verdict, which the law and the rights of the defendant demand of you; and in determining the guilt or innocence of the defendant it becomes your duty to accept the law of the case as given to you by the Court in these instructions.

11.

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so, you should not regard the remarks or expressions of counsel, unless as the same are in conformity with the facts proved, or are reasonably deducible from

such facts and the law as given to you in these instructions.

12.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust. [124]

13.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you not derived from the evidence as given by the witnesses upon the witness-stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the Court. Whatever verdict is warranted under the evidence and the instructions of the Court, you should return, as you have sworn so to do.

The character and degree of the punishment is to be determined by the Court, within the limits fixed by law, and you are instructed that you should not

consider the matter of the punishment in making up your verdict.

14.

You are instructed that you are the sole judges of the credibility of the witnesses appearing before you, and of the reasonableness of their testimony, and of the weight to be given their evidence.

The law also makes it my duty to instruct you that you are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption of other evidence, satisfying your minds. You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you [125] in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You may reject the false part and give such weight to other parts as you think they are entitled to receive.

15.

This defendant is presumed to be innocent of the charge against it until it is proved to be guilty beyond a reasonable doubt by the evidence produced in this case and submitted to you. This presumption of innocence is a right guaranteed to the defendant by law and remains with it, and should be given full force and effect by you, until such time in the progress of this case as you are satisfied of its guilt from the evidence beyond a reasonable doubt.

You are instructed that the indictment in this case

is not to be taken or considered by you as any evidence against the defendant, but as merely a charge or allegation brought against it.

16.

The term "reasonable doubt" as defined by the law and as used in these instructions means that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they cannot feel an abiding conviction, amounting to a moral certainty, of the truth of the charge. The term "reasonable doubt" does not mean every doubt but such a doubt must be actual and substantial, as contradistinguished from some vague apprehension, and [126] must arise from the evidence, or from the want of evidence, or from such sources. A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitancy in their own most important affairs. Proof beyond all reasonable doubt does not mean proof beyond every doubt. Absolute certainty in the proof of a crime is rarely obtainable, and never required.

17.

I hand you herewith two forms of verdict, one finding the defendant guilty as charged in the indictment, and the other finding the defendant not guilty.

You may take with you these instructions for your guidance, and when you have unanimously agreed upon your verdict, you will sign the one you find, by your foreman, and return it into court; the other you will destroy.

Defendant's Exceptions to Instructions of Court to Jury.

Mr. DIMOND.—At this time, before the jury retires, the defendant wishes to except to the Court's Instruction Number 2 as given, on the ground that the definition of the word "wantonly" is not sufficient, in that it does not include the element of perversity, mischievous intent and turpitude.

The defendant excepts to Instruction Numbered Defendant's Instruction B, which defendant requested be given to the jury as our Instruction Number 9, in that it is given subject to [127] the qualifications mentioned in the Court's Instruction Number 8.

The defenant excepts to Instruction Numbered Defendant's Iustruction C, given by the Court to the jury, and which was submitted to the Court by the defendant and asked to be given to the jury as defendant's Instruction Number 10 in that it also is given by the Court subject to the qualifications of Instruction Number 8.

The defendant excepts to the Court's Instruction Number 5 given to the jury in that it admits evidence of collateral crimes, or alleged collateral crimes, as the first ground, and on the second ground, that some of these alleged crimes were subsequent to the date, the 26th day of July, 1913, which the defendant

claims is the selection by law of the date upon which the plaintiff should stand to prove its case; and upon the further ground that some of them are subsequent to the 28th day of July, 1913, the date finally elected by the Government; and on the further ground that the language of the instruction is that it is given as showing—that the evidence was admitted as showing or tending to show a long course of conduct on the part of the defendant, etc.

The defendant also excepts to the Court's Instruction Number 7, the last part of Number 7, as follows:—"The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:" for the reason that the statement of the law here referred to, that is, Number 8 of the Court's instructions to the jury, is not the law of this case and is contrary to the law. [128]

The defendant also excepts to the Court's Instruction Number 8 given to the jury, that particular part of it as follows:

> "Provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract *contract* cannot lawfully be made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is

using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away wasted and destroyed in consequence."

On the ground that said instruction is not the law on this case and is contrary to the law governing the defendant's liability in this case, for the reason that it is shown by the evidence that the Government's two witnesses, William Hunter and Hayward March had full and complete control and management of the trap in question; that they could have opened the door to the pot in the fish-trap and thereby permitted the fish to escape; that it was the duty of the witnesses William Hunter and Hayward March to have either closed the entrance of the trap, so that no fish could enter or to have opened the door to the pot, so that the fish could have passed through the trap and escaped to sea again, or it was the duty of said two witnesses when the defendant company's boat failed to call for the fish to have dried or salted or otherwise disposed of the fish that

were taken in their trap, for a beneficial purpose. It also appears from the testimony that the defendant company had no power, right or control over the management [129] of said trap and could not have closed said trap so that the fish could not enter, nor could it open the door of the pot of the trap so that the salmon could pass through and escape to sea. In other words, it appears from the testimony that the defendant company had no power or control over said trap so that it could in any manner limit the amount of fish caught in said trap.

It further appears from the evidence that the witnesses, William Hunter and Hayward March, the owners of said trap, were neither employees nor agents of the defendant company, but were independent contractors and that thereby the witnesses, William Hunter and Hayward March, assumed the responsibility for all fish taken in said trap.

The defendant excepts to the refusal of the Court to give defendant's requested Instruction number 2, requested by defendant to be given to the jury, as follows:—

> "You are instructed that before you will be warranted in convicting this defendant upon the indictment herein it will be necessary that the Government shall have proven to your satisfaction, beyond all reasonable doubt:—(first) That a considerable number of salmon were wasted and destroyed on the day and at the place named in the indictment; (second) That the defendant wasted and destroyed the salmon at the time and place charged; and (third) If

you shall find that the salmon were wasted and destroyed by the defendant, before you can convict you must also find to your satisfaction, beyond all reasonable doubt, that such wasting and destruction by the defendant was done unlawfully and wantonly."

We also except to the refusal of the Court to give defendant's requested Instruction Number 3, requested by defendant to be given to the jury, as follows:

"You are further charged that the word 'wanton' when used in a statute making criminal the unlawful and wanton killing of animals and fish imports that the act is directed against the animals or fish themselves as distinguished [130] from a wilful killing with the intent to injure the owner or violating the law. The act must be done intentionally, by design, without excuse, and under circumstances evidencing lawless and destructive spirit."

Defendant also excepts to the refusal of the Court to give Instruction Number 4 requested by defendant, as follows:

"You are instructed that the word "unlawfully" implies that an act is not done in the manner as allowed or required by law; but the term 'wantonly' implies turpitude and that the act was done for a wilful and wicked purpose."

Defendant also excepts to the refusal of the Court to give Instruction Number 5 requested by defendant, as follows:

"You are further charged that the word 'turpitude' as used in the last instruction means inherent baseness or vileness of principle, words or action; shameful; wicked; depraved. Moral turpitude is a matter done contrary to justice, honesty, principle or good morals."

Defendant also excepts to the refusal of the Court to give Instruction Number 6 requested by defendant, as follows:

"You are charged that before you can find an act to have been done wantonly, you must be satisfied beyond all reasonable doubt that it was committed perversely, recklessly, without excuse, and without regard to the rights of others and without regard to the law. In other words, such act must have been with mischievous intent, although the matter need not necessarily have been done with settled malice. Therefore, before you will be justified in returning a verdict of guilty in the case before you, you must find beyond all reasonable doubt that salmon were wasted and destroyed at the time and place as charged in the indictment, and also that such waste and destruction was done by the defendant recklessly, without excuse and without regard to the rights of others, perversely, with mischievous intent, and under such circumstances as to imply turpitude."

Defendant also excepts to the refusal of the Court to give Instruction Number 7 as requested by defendant, as follows:

"I instruct you that the defendant in this action is [131] not brought to the bar of this court to answer to the charge of merely destroying salmon. The laws of the United States do not punish for the mere loss of fish. The law recognizes the fact that in the operation of a business such as a cannery, some waste of food fish will necessarily occur and that such waste and destruction are inevitable. The law, therefore, wisely refuses to punish for things which cannot be avoided. But what the law does prohibit and punish is not the waste or destruction of food fish, but the wanton and reckless waste or destruction thereof. And you must return a verdict of not guilty herein even if you shall be satisfied beyond all reasonable doubt, that some salmon were lost in the West Foreland trap, or were wasted after being taken from the trap, unless you shall also believe beyond all reasonable doubt that the defendant, or some one under its control and acting for it, wantonly and unlawfully destroyed the said fish; and the burden of proving these charges beyond all reasonable doubt rests upon the Government."

Now, coming to our Instruction Number 9, the defendant excepts to the refusal of the Court to give Instruction #9 without qualification, it being given by the Court as the Court's Instruction B, but subject to the qualification of Instruction #8 of the Court.

We ask a like exception to the refusal of the Court to give our requested Instruction #10, which was

given as Court's Instruction C to the jury, but with the qualification that it was given subject to the provisions of Instruction #8.

The defendant excepts to the refusal of the Court to give Instruction Number 11 requested by defendant, as follows:

> "I instruct you that before you are warranted in finding the defendant corporation guilty of the crime charged in the indictment, you must find beyond a reasonable doubt that the defendant, at the time it furnished a part of the gear for the construction of the trap in question, then and there agreed in all events to take and receive from Hunter and March all the fish caught in that trap during the fishing season of 1913." [132]

The defendant excepts to the refusal of the Court to give Instruction #12 requested by defendant, as follows:

> "I instruct you that the evidence in this case shows that the fish-trap at West Foreland where the fish alleged to have been wasted in the year 1913, was operated and controlled by witnesses William Hunter and Hayward March and that the defendant company did not have any control over the management or operation of this trap, and unless you believe from the evidence, beyond all reasonable doubt, that the defendant company positively agreed with Hunter and March that it would take all the fish caught in this trap during the season of 1913, then you must find the defendant not guilty.

The defendant excepts to the refusal of the Court to give Instruction #13, requested by defendant, as follows:

> "You are instructed that even if you shall find beyond all reasonable doubt that a large number of salmon, which had been caught at the West Foreland trap of William Hunter and Hayward March, were wasted and destroyed, you will not be warranted in returning a verdict of guilty against the defendant unless you shall further find, beyond all reasonable doubt, that the defendant was the owner of the trap and responsible for its operation; or, that it was bound by virtue of some contract with Hunter and March to take all the fish caught in the trap, within such time after the same were caught as would prevent their waste or destruction; or, that Hunter and March were the agents or employees of the defendant, as those terms shall hereinafter be defined to you."

The defendant excepts to the refusal of the Court to give Instruction #14 requested by defendant, as follows:

> "I instruct you that even if you believe from the evidence that the defendant corporation agreed with Hunter and March to take all the salmon caught in the trap in question during the season of 1913 and that it failed to do so, and that, owing to its failure to take the salmon caught, witnesses Hunter and March threw the fish away and thereby they were wasted and destroyed, still if it were possible for Hunter

and March at the time the company refused to take the fish in question to have dried the fish, or otherwise have preserved them for a beneficial purpose, I instruct you that it was the duty of Hunter and March to have done so, and that this defendant was not criminally responsible for the act of Hunter and March in throwing away or wasting the salmon in question, and you must find the defendant not guilty." [133]

The defendant excepts to the refusal of the Court to give Instruction Number 15 requested by defendant, as follows:

"You are instructed that even if you find from the evidence, beyond all reasonable doubt, that the defendant company made an agreement, contract or arrangement with the witness Hunter, or the witness March, or both, or either of them, to call for and take all salmon caught in said trap near West Foreland, and that the defendant failed to call for and take all such salmon and that some of such salmon were thereupon wasted or destroyed, and that Hunter or March could have prevented such salmon from being wasted or destroyed by drying the same, or using them in some other lawful manner, you cannot find the defendant guilty."

The defendant excepts to the refusal of the Court to give Instruction #16 requested by defendant, as follows:

"I instruct you that if you believe from the evidence that witnesses, William Hunter and

Hayward March, had or exercised the control and management of the fishing-trap described in the indictment and testified to by the witnesses, that they, Hunter and March, were responsible for all fish caught in said trap until the same were sold and delivered to the defendant company, and that of any fish caught in this trap during the season of 1913 were destroyed or wasted contrary to law, before the same were destroyed or delivered to defendant company, then the defendant company cannot be legally convicted for such waste, regardless of any contract existing between Hunter and March and the defendant company, and you must therefore find the defendant not guilty."

Defendant excepts to the refusal of the Court to give Instruction #17 requested by defendant, as follows:

"You are instructed that the witnesses Hunter and March were in charge of the West Foreland trap, where it is alleged that a waste of salmon occurred, and that you cannot find the defendant guilty in this case unless you shall find beyond all reasonable doubt that the said Hunter and March, or either of them, in charge of said trap, were the employees or agents of the defendant corporation, and in that connection you are instructed that one is an employee or agent who is subject to the control or direction of the employer." [134]

The defendant excepts to the refusal of the Court

to give Instruction #18 requested by defendant, as follows:

> "An employee has been defined as one who works for an employer; a person working for a salary or services; a person employed; one who is engaged in the service of another; one whose time and skill are occupied in the business of his employer.
>
> An agent, as the term is used herein, is one who acts for another by the authority of that other; one who undertakes to transact the business or manage the affairs of another by authority or on account of such other."

The defendant excepts to the refusal of the Court to give Instruction #19 requested by defendant, as follows:

> "If you find from the evidence that Hunter and March had the exclusive right to manage and operate said trap as they might see fit, then you cannot find the defendant in this case guilty of the crime charged, for in that event, although there may have been a contract between Hunter and March and the defendant herein whereby the defendant agreed to take certain fish of Hunter and March, the latter were independent contractors."

The defendant excepts to the refusal of the Court to give Instruction #20 requested by defendant, as follows:

> "An independent contractor, as the term has been used in the foregoing instruction, is one

who contracts to do a specific piece of work, furnishing his own assistance and executing the work entirely in accordance with his own ideas, either in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the other in respect to details of the work. The general test by which it is determined whether a person is an independent contractor or an employee is, who has the general control of the work? Who has the right to direct what shall be done and how to do it?" [135]

The defendant excepts to the refusal of the Court to give Instruction #21 requested by defendant, as follows:

"You are further instructed that an indictment is merely a charging paper, and the fact that the indictment in this case charges the defendant with wasting and destroying fish, either many or few, is not to be taken by you as evidence in any way and is not to be construed by you as having any bearing upon the question of the guilt or innocence of defendant; nor is the fact that it is alleged that large numbers of salmon have been destroyed to be taken by you in any other way than as a mere charge or allegation. And you are cautioned that you must not allow the contents of the indictment to in any way bias or prejudice you in your deliberations of this case."

The defendant excepts to the refusal of the Court

to give Instruction #23 requested by defendant, as follows:

> "You are further instructed that the defendant is not required by law to prove that it is innocent, but the Government is required to prove to your satisfaction, beyond all reasonable doubt, that each and all of the material allegations in the indictment are true, as the term 'reasonable doubt' has been defined to you."

The defendant excepts to the refusal of the Court to give Instruction #24 requested by defendant, as follows:

> "I instruct you that under the laws of Alaska it is unlawful to can or salt for sale for food any salmon more than forty-eight hours after the same has been killed or taken from the water."

The defendant excepts to the refusal of the Court to give Instruction #25 requested by defendant, as follows:

> "I instruct you that if you find from the evidence, beyond all reasonable doubt, that the defendant corporation did unlawfully and wantonly waste or destroy salmon in large quantities, at the time and place alleged in the indictment, before you can find it gulity of the crime charged you must further find from all the testimony before you that there is testimony introduced at the trial of this cause, other than that of William Hunter and Hayward March, the two Government witnesses in this case, tending in some manner to corroborate the testimony of these two witnesses; and I instruct you that un-

der the testimony offered in this trial, should [136] you find the defendant corporation guilty of unlawfully and wantonly wasting salmon at the time and place alleged in the indictment, then said two witnesses, William Hunter and Hayward March, are accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices, uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

The defendant excepts to the refusal of the Court to give Instruction #26 requested by defendant, as follows:

"In its operation of its salmon cannery at Kasiloff the defendant in this action was governed by the provisions of the law known as the Act of June 30, 1906, commonly called the Food and Drugs Act, which provides, in part, as follows:

'That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food * * * which is adulterated * * * within the meaning of this Act. * * * That for the purpose of this Act an article shall be deemed to be adulterated: * * * Sixth: If it consists in whole or in part of a filthy, decomposed, or putrid *anumak* or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.'

Therefore, I instruct you that if the salmon in question alleged to have been wasted and destroyed had in any manner become decomposed before the defendant corporation could get them to its cannery at Kasiloff and can the same, then and in that event said defendant could not have canned said salmon without violating the law above quoted, regardless as to whether the salmon were killed forty-eight hours previously or not."

The defendant excepts to the refusal of the Court to give Instruction #27 requested by defendant, as follows:

"You are instructed that under the testimony offered by the Government in this case, it has elected to stand upon the 26th day of July, 1913, as the day on which it claims the alleged violation of law as appears in the indictment, was committed by the defendant corporation. You will, therefore, not consider, in arriving at your verdict, any of the testimony offered, tending to establish a waste or destruction of salmon on any date after the 26th day of July, 1913. And unless you are [137] satisfied, beyond a reasonable doubt, that the defendant corporation unlawfully and wantonly wasted or destroyed a large number of salmon on that date, you must find the defendant not guilty."

The defendant excepts to the refusal of the Court to give defendant's Requested Instruction #28, as requested by defendant, as follows:

"You are instructed that in determining whether the defendant unlawfully and wantonly destroyed or wasted a large number of salmon on the 26th day of July, 1913, at the place alleged in the indictment, you are to consider all the evidence before you, and in determining whether any waste or destruction of fish occurred on the date mentioned, as alleged in the indictment, should you find that there was such waste or destruction, you are to consider what notice, if any, the defendant had that there were fish at such trap and what opportunity the defendant had to obtain such fish and can them before they became wasted of destroyed."

By the COURT.—The exceptions will be allowed. The jury may now retire. [138]

Certificate of Stenographer to Proceedings.

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, United States of America vs. Alaska Packers Association, a Corporation; that the above is a full, true and correct transcript of the evidence introduced at said trial and other proceedings had thereat.

Dated at Valdez, Alaska, November 15, 1916.

L. HAMBURGER. [139]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Bill of Exceptions.

Comes now the above-named defendant, Alaska Packers Association, a corporation, by its attorneys Donohoe & Dimond and petitions and prays the court to settle and file and have made a part of the record of the foregoing and above-entitled cause the hereinafter mentioned exceptions; some of which may, and others which do not, appear of record herein.

And be it remembered that this cause was commenced on the 15th day of October, 1914, by filing the indictment which now appears in said record, and thereafter defendant, Alaska Packers Association, a corporation, appeared and such proceedings were had to all of which defendant Alaska Packers Association at the time thereof duly excepted, to wit:

I.

Excepts to the order of the Court made and entered on the 2d day of April, 1915, overruling defendant's motion to strike the indictment in the above-entitled cause which said motion to strike said indictment appears in the record of this cause.

II.

Excepts to the order of the Court made and en-

tered on the 2d day of April, 1915, overruling defendant's [140] demurrer to said indictment which said demurrer appears of record in this cause.

III.

And be it further remembered that this cause came on for trial on the 16th day of September, 1916, before the Court and jury, the plaintiff being represented by the Honorable Wm. A. Munley, Assistant United States Attorney and the defendant herein being represented by its attorneys Messrs. Donohoe & Dimond. The same proceeded to trial and the following is the testimony and evidence that was submitted on the part of plaintiff and submitted and offered on the part of the defendant Alaska Packers Association, a corporation. And at said trial the defendant Alaska Packers Association, a corporation, by its attorneys made the several objections and exceptions to the rulings of the Court as to the admissibility of testimony offered by the plaintiff, and at said trial the defendant, Alaska Packers Association, a corporation, by its attorneys made the several objections and exceptions to the ruling of the Court refusing to admit certain evidence offered at the trial by the defendant. All of which more fully appears from the transcript of the proceedings of the trial which said transcript is hereby embodied and made a part of this bill of exceptions.

IV.

That at said trial defendant, Alaska Packers Associations, a corporation, by its attorneys, excepted to the order of the Court at the close of plaintiff's case allowing the plaintiff to elect the date on which the

plaintiff would stand for a conviction on the indictment and excepts to the election made by the plaintiff as the 28th day of July, 1913, on which to stand for a conviction on the indictment all of which more fully appears from the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions. [141]

V.

Excepts to the ruling of the Court denying defendant's motion to strike out of the record the testimony regarding the waste and destruction of salmon at or near the place named in the indictment at any time subsequent to the 28th day of July, 1913, all of which more fully appears from the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VI.

Excepts to the ruling of the Court denying defendant's motion at the close of the testimony on the part of the plaintiff to instruct the jury to return a verdict finding the defendant not guilty of the crime charged in the indictment on the grounds appearing fully in the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VII.

Excepts to the ruling of the Court denying defendant's motion made at the close of entire case to instruct the jury to return a verdict finding the defendant not guilty of the crime charged in the

indictment on the same grounds set forth in Exception No. 6, all of which more fully appears in the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VIII.

Excepts to the ruling of the Court in giving certain instructions to the jury and in refusing to give certain other instructions present to the Court by the defendant and requested by the defendant to be given to the jury as the law of this case, all of which more fully appears from the transcript of the proceedings of the trial which said transcript is hereby embodied and made a part of this Bill of Exceptions.
[142]

IX.

Excepts to the ruling of the Court made and entered on the 14th day of October, 1916, denying defendant's motion in arrest of judgment which said motion appears of record in this cause.

X.

Excepts to the order of the Court made and entered on the 14th day of October, 1916, overruling and denying the motion of defendant for a new trial; said motion and order overruling and denying the same now appears of record in this cause.

XI.

Excepts to the final judgment and sentence of the Court made, rendered and filed by the Court herein on the 14th day of October, 1916, which said judgment and sentence appears of record in this cause.

DONOHOE and DIMOND,
Attorneys for Defendant.

The above and foregoing exceptions, including the exception to the ruling of the Court in denying defendant's motion to strike the indictment; and the ruling of the Court in overruling defendant's demurrer to the indictment; and all the exceptions to the ruling of the Court at the trial of the cause, as the same appears from the transcript of the proceedings of said cause and of the testimony offered, received and rejected at the trial of this cause; and to the ruling of the Court giving certain instructions to the jury; and the refusal to give to the jury certain other instructions presented to the Court and requested to be given by the defendant as the same appears in a transcript of the proceedings had at the trial of this cause in this bill of exceptions contained, and each of them are by the Court allowed and settled and the [143] transcript of the testimony herein contained; and of the instructions given by the Court to the jury; and of the instructions presented by the defendant and requested to be given by the Court to the jury and refused by the Court, herein contained, and a transcript of the proceedings had at the trial of this cause consisting of 109 pages of typewritten matter, and the exhibit attached thereto, constitutes a full, true and correct copy of the proceedings of the said trial and of the testimony and evidence and all of the same and of the instructions given by the Court to the jury and of the instructions presented to the Court and requested by the defendant to be given to the jury and refused by the Court, thereupon which said cause

was tried and final judgment and sentence rendered therein.

IT IS HEREBY ORDERED that the same be filed and made a part of the record of this cause in the office of the clerk of the above-entitled cause.

IT IS FURTHER ORDERED that the indictment; defendant's motion to strike the indictment; minute order denying said motion to strike the indictment; defendant's demurrer to the indictment and minute order overruling defendant's demurrer to the indictment; verdict of the jury; defendant's motion in arrest of judgment and the minute order of the Court denying defendant's motion in arrest of judgment; defendant's motion for a new trial and minute order denying defendant's motion for a new trial and the judgment and sentence of this Court and the order of this Court extending the time for defendant to prepare and settle his bill of exceptions, together with the bill of exceptions herein filed, shall constitute the defendant's bill of exceptions upon the writ of error in this cause to the United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open court, the said court being the District Court for the Territory of Alaska, Third Division, [144] this 7th day of December, 1916, and at the term of court in which the judgment of said cause was rendered.

By the Court.

FRED M. BROWN,
Judge.

Due and legal service is hereby accepted this 7th day of December, 1916, by receipt of copy thereof.

H. G. BENNET,

Asst. United States Attorney and Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 53. [145]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Assignment of Errors.

Comes now the defendant, Alaska Packers Association, in the above-entitled action, and makes and files the following Assignment of Errors, upon which the defendant will rely in the prosecution of its Writ of Error herein.

First. The Court erred in denying the motion of defendant to set aside and quash said indictment upon the grounds set forth in said motion as the same now appears in the record of said cause.

Second. The Court erred in overruling defendant's demurrer to the indictment which said demurrer appears in the record of said cause and is made on the following grounds:

1. That the said indictment does not substantially conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged as the crime are not clearly and distinctly set forth in ordinary and concise language without repetition so as to enable a person of common understanding to know what is intended.

(b) That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended.

(c) That the acts and omissions charged as the crime are not stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) That the defects and imperfections of said indictment are such that they actually prejudice the substantial rights of the defendant upon the merits.
[146]

2. That said indictment does not charge or allege facts against said defendant sufficient to constitute any offense or the violation of any law by the defendant.

3. That the facts stated in said indictment do not constitute a crime.

4. That more than one crime is charged in the

indictment without stating it in the manner prescribed by statute.

5. Said indictment is not direct and certain as regards the crime charged.

6. That said indictment is not direct and certain as regards the particular circumstances of the crime charged.

7. That the said indictment fails to sufficiently show that the crime charged was committed within the jurisdiction of the said court.

8. That said indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action.

9. That said indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made.

Third. The Court erred in permitting the plaintiff over defendant's objections to introduce evidence tending to establish that a large number of salmon or food fish were wasted or destroyed unlawfully and wantonly by the defendant in more than once thus permitting the jury to consider evidence of crimes alleged to have been committed by the defendant other than the crime charged in the indictment which said objection and ruling of the Court appears in defendant's bill of exceptions containing the record and proceedings of the trial of said cause.

Fourth. The Court erred in denying defend-

ant's motion made at the time of the introduction of the first evidence by the plaintiff tending to establish the unlawful and wanton waste and destruction of a large number of salmon or other food fish by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment, which said motion is fully [147] set forth in the record of the proceedings of said trial contained in defendant's Bill of Exceptions.

Fifth. The Court erred in overruling defendant's objections to evidence tending to establish the commission of the crime alleged in the indictment on any day other than the 26th day of July, 1913, that being the time elected by law as the date of the crime charged in the indictment for the reason that the plaintiff refused to elect a date and the evidence of the plaintiff's witnesses first given tended to show a wanton and unlawful waste and destruction of a large number of salmon on the 26th day of July, 1913, all of which fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Sixth. The Court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of plaintiff's testimony for the reason that the 26th day of July, 1913, had been elected by law as such date as the 26th day of July, 1913, was the date the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed, all of which

fully appear from the transcript of the proceedings in the trial contained in defendant's Bill of Exceptions.

Seventh. The Court erred in permitting the plaintiff, over defendant's objections made at said time, to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reason stated in the last preceding assignment of error, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Eighth. The Court erred in permitting the plaintiff to introduce over the objections of defendant evidence tending to establish the wanton and unlawful waste and destruction by the [148] defendant of a large number of salmon or food fish on any day subsequent to the 26th day of July, 1913, for the reason that such evidence of subsequent collateral crimes or alleged crimes is not in any manner relevant proof of the crime charged in the indictment, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Ninth. The Court erred in permitting the plaintiff to introduce over the objections of the defendant evidence attempting to establish the wanton and unlawful waste or destruction of a large number of salmon or food fish by the defendant upon any date subsequent to the 28th day of July, 1916, that being the date elected by the plaintiff as the date on which the crime charged in the indictment was committed for the reason that evidence of subsequent collateral

crimes or alleged crimes it is not relevant or important testimony to prove the crime charged in the indictment.

Tenth. The Court erred in denying defendant's motion to instruct the jury to return a verdict of not guilty, which said motion was made at the close of plaintiff's testimony, the grounds of which are as follows:

1. That it appears from all the testimony offered upon the part of the Government that if any fish or salmon were destroyed or wasted at the place and time alleged in the indictment, on the date elected by the Government as the date on which they would stand for the time, to wit, the 28th day of July, 1913, they were destroyed or wasted by the two witnesses William J. Hunter and Hayward March, and not by this defendant and that this defendant was in no wise criminally liable for the waste and destruction of such fish.

2. That it appears from all the testimony introduced by the plaintiff that the fish-trap in which these fish or salmon were caught was entirely operated and controlled by the Government's *witness,* William J. Hunter and Hayward March, and that the defendant corporation had no supervision or control over the management or operation of the same. That the said two Government witnesses took fish from said trap at such times and in such manner as they saw fit and that they, the said two witnesses, were not subject, in any manner, to the orders, control or direction of the defendant company; and if it were impossible for the company for the defend-

ant corporation, to take care of the fish caught in said trap, it had no power or control over the operation of said trap, so it could prevent the fish entering said trap, or open the door in the pot of said trap so the fish could pass through and escape, and therefore the defendant corporation is in no manner criminally liable for the alleged waste or destruction of the salmon in question. [149]

3. That the Government has wholly and utterly failed to show by its testimony that the defendant company wilfully, unlawfully or wantonly did waste or destroy any salmon whatever at the time and place alleged in the indictment, or upon the 28th day of July, 1913.

4. That from the testimony introduced by the Government, the Government has utterly failed to establish that there was any salmon whatever destroyed or wasted, at or near the place described in the indictment, on the day alleged in the indictment.

5. That if the defendant corporation was in any manner criminally responsible for the waste and destruction of the salmon, as alleged in the indictment, the Government has utterly failed to show such responsibility and to prove the crime charged in the indictment against the defendant by any testimony, act or circumstance other than the testimony of William J. Hunter and Hayward March, and that the testimony of these two Government witnesses clearly shows that if the crime was committed, as alleged in the indictment, that they were accomplices in the commission of the crime, and therefore a conviction of this defendant cannot be had on the testi-

mony of such accomplices, uncorroborated as it is by any other evidence tending to connect the defendant with the commission of the crime. The motion was by the Court denied. To which ruling of the Court defendant is allowed an exception.

Eleventh. The Court erred in denying defendant's motion to instruct the jury to return a verdict of not guilty at the close of the whole case on each and all of the grounds set forth in the last preceding assignment of errors, all of which appears more fully in the transcript of the proceedings of the trial contained in defendant's Bill of Exceptions.

Twelfth. The Court erred in denying defendant's motion made at the close of plaintiff's case to strike out of the record all testimony regarding the unlawful and wanton waste or destruction of salmon at or near the place mentioned in the indictment at any date subsequent to the 28th day of July, 1913, on the ground that such testimony was incompetent, irrelevant and immaterial, the ground of this error is that under the former ruling of the Court the plaintiff selected the 28th day of July, 1913, as the date on which the defendant would stand for a conviction of the crime charged in the indictment and any evidence admitted at the trial tending to establish collateral crimes subsequent to that date is incompetent, irrelevant and immaterial and was prejudicial to the substantial rights of the defendant.

Thirteenth. The Court erred in giving to the jury its Instruction No. 2—the giving of which was duly excepted to by the defendant in the presence of the jury and before the jury retired on the ground

that the word wantonly was not properly defined in that the Court did not include in the definition the elements of perversity, mischief and turpitude, all of which more fully appears in the transcript of the proceedings of the trial contained in defendant's Bill of Exceptions. [150]

Fourteenth. The Court erred in giving to the jury its Instruction B in the form given, the giving of which was duly excepted to by the defendant in the presence of the jury before it retired, said instruction being Instruction No. 9 offered by the defendant and requested to be given to the jury. Said instruction, however, was given by the Court subject to the qualifications and provisions of the Court's Instruction No. 8 which was afterwards given to the jury.

Fifteenth. The Court erred in giving to the jury its Instruction C in the form given to which instruction the defendant duly excepted in the presence of the jury before it retired, said Instruction C being Instruction No. 10 offered by the defendant and requested to be given to the jury but as given by the Court to the jury it was given subject to the qualifications and provisions of the Court Instruction No. 8 thereafter given to the jury, and as Court Instruction No. 8 does not correctly state the law governing this case and is contrary to the law governing defendant's liability in this case, all of which will more fully appear in defendant's Assignment of Errors to Instruction No. 8 given by the Court and more fully appears in a transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Sixteenth. The Court erred in giving to the jury its Instruction C in the form given, to which instruction the defendant duly excepted in the presence of the jury before it retired, said instruction being Instruction No. 10 offered by the defendant and requested to be given to the jury but as given to the jury it was given subject to the qualifications and provisions of the Court's Instruction No. 8, as the law of this case and is contrary to the law governing defendant's liability in this case as more fully appears in the assignment of error hereinafter set out regarding the Court giving to the jury said Instruction No. 8. [151]

Seventeenth. The Court erred in giving to the jury its Instruction No. 5 which was duly excepted to by the defendant in the presence of the jury and before it retired. Said exception is based on the ground that said instruction admitted to the consideration of the jury evidence tending to establish collateral crimes. Some of these alleged crimes were subsequent to the 26th day of July, 1913, the date on which defendant claims is elected by law as the date upon which the plaintiff should stand to prove the crime charged, and on the further ground that some of the alleged crimes were subsequent to the 28th day of July, 1913, the date formally selected by the plaintiff on which it would stand for a conviction in this case; on the further ground that the second or middle paragraph of said instruction and particularly the following quoted phrase: "This testimony was admitted only as showing a long course of conduct, etc.," was such as would naturally and neces-

sarily prejudice the substantial rights of the defendant in the minds of the jury and that the defendant would necessarily take therefrom an indication that the Court believe the defendant guilty.

Eighteenth. The Court erred in giving to the jury its Instruction No. 7 in the form given to which the defendant duly excepted in the presence of the jury and before it retired. Said exception is based on the following portion of said instruction:

> "The last two paragraphs are to be considered by you in connection *the* the following statement of the law concerning contracts for the catching or trapping of salmon, to wit":

The statement of law referred to in the above quoted portion of the Court's Instruction No. 7 is Court's Instruction No. 8, which last-named instruction is contrary to the law and is against the law and does not correctly state the law covering defendant's liability in this case.

Ninteenth. The Court erred in giving to the jury its Instruction No. 8, the giving of which was duly excepted to by the [152] defendant in the presence of the jury and before it retired the particular part of said instruction excepted to is as follows:

> "Provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve

such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence."

On the ground that said instruction is not the law in this case and is contrary to the law governing the defendant's liability in this case, for the reason that it is shown by the evidence that the Government's two witnesses, William Hunter and Hayward March had full and complete control and management of the trap in question; that they could have opened the door to the pot in the fish-trap and thereby permitted the fish to escape; that it was the duty of the witnesses William Hunter and Hayward March to have either closed the entrance of the trap, so that no fish could enter or to have opened the door to the pot, so that the fish could have passed through the trap and escaped to sea again, or it was the duty of said two witnesses when the defendant company's

boat failed to call for the fish to have dried or salted or otherwise disposed of the fish that were taken in their trap, for a beneficial purpose. It also appears from the testimony that the defendant company had no power, right or control over the management of said trap and could not have closed said trap so that the fish could not enter, nor could it open the door of the pot of the trap so that the salmon could pass through and escape to sea. In other words, it appears from the testimony that the defendant company had [153] no power or control over said trap so that it could in any manner limit the amount of fish caught in said trap.

It further appears from the evidence that the witnesses, William Hunter and Hayward March, the owners of said trap, were neither employees nor agents of the defendant company, but were independent contracts and that thereby the witnesses, William Hunter and Hayward March, assumed the responsibility for all fish taken in said trap.

Twenty. The Court erred in refusing to give to the jury defendant's Instruction No. 2 present to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are instructed that before you will be warranted in convicting this defendant upon the indictment herein it will be necessary that the Government shall have proven to your satisfaction, beyond all reasonable doubt: (first) That a considerable number of salmon were wasted and

destroyed on the day and at the place named in the indictment; (second) That the defendant wasted and destroyed the salmon at the time and place charged; and (third) If you shall find that the salmon were wasted and destroyed by the defendant, before you can convict you must also find to your satisfaction, beyond all reasonable doubt, that such wasting and destruction by the defendant was done unlawfully and wantonly."

Twenty-one. The Court erred in refusing to give to the jury defendant's Instruction No. 3 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are further charged that the word 'wanton' when used in a statute making criminal the unlawful and wanton killing of animals and fish imports that the act is directed against the animals or fish themselves as distinguished from a wilful killing with the intent to injure the owner or violating the law. The act must be done intentionally, by design, without excuse, and under circumstances evidencing lawless and destructive spirit."

Twenty-two. The Court erred in refusing to give to the jury defendant's Instruction No. 4 presented to the Court by the defendant and requested to be given to the jury to which said [154] refusal defendant duly excepted in the presence of the jury

and before it retired. Said instruction is as follows:

> "You are instructed that the word 'unlawfully' implies that an act is not done in the manner as allowed or required by law; but the term 'wantonly' implies turpitude and that the act was done for a wilful and wicked purpose."

Twenty-three. The Court erred in refusing to give to the jury defendant's Instruction No. 5 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further charged that the word 'turpitude' as used in the last instruction means inherent baseness or vileness of principle, words or action; shameful; wicked; depraved. Moral turpitude is a matter done contrary to justice, honesty, principle or good morals."

Twenty-four. The Court erred in refusing to give to the jury defendant's Instruction No. 6 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are charged that before you can find an act to have been done wantonly, you must be satisfied beyond all reasonable doubt that it was committed perversely, recklessly, without excuse, and without regard to the rights of others and without regard to the law. In other words

such act must have been done with mischievous intent, although the matter need not necessarily have been done with settled malice. Therefore, before you will be justified in returning a verdict of guilty in the case before you, you must find beyond all reasonable doubt that salmon were wasted and destroyed at the time and place as charged in the indictment, and also that such waste and destruction was done by the defendant recklessly, without excuse and without regard to the rights of others, perversely, with mischievous intent, and under such circumstances as to imply turpitude."

Twenty-five. The Court erred in refusing to give to the jury defendant's Instruction No. 7 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that the defendant in this action is not brought to the bar of this Court to answer to the charge of merely destroying salmon. The laws of the United States [155] do not punish for the mere loss of fish. The law recognizes the fact that in the operation of a business such as a cannery, some waste of food fish will necessarily occur and that such waste and destruction are inevitable. The law, therefore, wisely refuses to punish for things which cannot be avoided. But what the law does prohibit and punish is not the waste or destruction

of food fish, but the wanton and reckless waste or destruction thereof. And you must return a verdict of not gulty herein even if you shall be satisfied beyond all reasonable doubt that some salmon were lost in the West Foreland trap, or were wasted after being taken from the trap, unless you shall also believe beyond all reasonable doubt that the defendant, or some one under its control and acting for it, wantonly and unlawfully destroyed the said fish; and the burden of proving these charges beyond all reasonable doubt rests upon the Government."

Twenty-six. The Court erred in refusing to give to the jury defendant's Instructions Nos. 9 and 10 in the form presented by the defendant and requested to be given to the jury, said instructions as given by the Court to the jury are its instructions B and C respectively, but both of said instructions were given subject to the qualifications and provisions contained in the Court's Instructions No. 8, it not being the law covering defendant's liability in this case. The defendant duly excepted to the Court's refusal to give said Instructions Nos. 9 and 10, without the qualifications mentioned, in the presence of the jury and before it retired.

Twenty-seven. The Court erred in refusing to give to the jury defendant's Instruction No. 11 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that before you are warranted in finding the defendant corporation guilty of the crime charged in the indictment, you must find beyond a reasonable doubt that the defendant, at the time it furnished a part of the gear for the construction of the trap in question, then and there agreed in all events to take and receive from Hunter and March all the fish caught in said trap during the fishing season of 1913."

Twenty-eight. The Court erred in refusing to give to the jury defendant's Instruction No. 12 presented to the Court by the defendant and requested to be given to the jury to which said [156] refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that the evidence in this case shows that the fish trap at West Foreland where the fish alleged to have been wasted in the year 1913, was operated and controlled by witnesses William Hunter and Hayward March and that the defendant company did not have any control over the management or operation of this trap, and unless you believe from the evidence, beyond all reasonable doubt, that the defendant company positively agreed with Hunter and March that it would take all the fish caught in this trap during the season of 1913, then you must find the defendant not guilty."

Twenty-nine. The Court erred in refusing to give to the jury the defendant's Instruction No. 13 presented to the Court by the defendant and requested

to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are instructed that even if you shall find beyond all reasonable doubt that a large number of salmon, which had been caught at the West Foreland trap of William Hunter and Hayward March, were wasted and destroyed, you will not be warranted in returning a verdict of guilty against the defendant unless you shall further find, beyond all reasonable doubt, that the defendant was the owner of the trap and responsible for its operation; or, that it was bound by virtue of some contract with Hunter and March to take all the fish caught in the trap, within such time after the same were caught as would prevent their waste or destruction; or, that Hunter and March were the agents or employees of the defendant, as those terms shall hereinafter be *fefined* to you."

Thirty. The Court erred in refusing to give to the jury defendant's Instruction No. 14 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "I instruct you that even if you believe from the evidence that the defendant corporation agreed with Hunter and March to take all the salmon caught in the trap in question during the season of 1913 and that it failed to do so, and that, owing to its failure to take the salmon

caught, witnesses Hunter and March threw the fish away and thereby they were wasted and destroyed, still if it were possible for Hunter and March at the time the company refused to take the fish in question to have dried the fish, or otherwise have [157] preserved them for a beneficial purpose, I instruct you that it was the duty of Hunter and March to have done so, and that this defendant was not criminally responsible for the act of Hunter and March in throwing away or wasting the salmon in question, and you must find the defendant not guilty."

Thirty-one. The Court erred in refusing to give to the jury defendant's Instruction No. 15 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are instructed that even if you find from the evidence, beyond all reasonable doubt, that the defendant company made an agreement, contract or arrangement with the witness Hunter, or the witness March, or both, or either of them, to call for and take all salmon caught in said trap near West Foreland and that the defendant failed to call for and take all such salmon and that some of such salmon were thereupon wasted or destroyed, and that Hunter or March could have prevented such salmon from being wasted or destroyed by drying the same, or using them in some other lawful manner, you cannot find the defendant guilty."

Thirty-two. The Court erred in refusing to give to the jury defendant's Instruction No. 16 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "I instruct you that if you believe from the evidence that witnesses, William Hunter and Hayward March, had or exercised the control and management of the fishing-trap described in the indictment and testified to by the witnesses, that they, Hunter and March, were responsible for all fish caught in said trap until the same were sold and delivered to the defendant company, and that if any fish caught in this trap during the season of 1913 were destroyed or wasted contrary to law, before the same were sold or delivered to defendant company, then the defendant company cannot be legally convicted for such waste, regardless of any contract existing between Hunter and March and the defendant company, and you must therefore find the defendant not guilty."

Thirty-three. The Court erred in refusing to give to the jury defendant's Instruction No. 17 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and [158] before it retired. Said instruction is as follows:

> "You are instructed that the witnesses Hunter and March were in charge of the West Fore-

land trap, where it is alleged a waste of salmon occurred, and that you cannot find the defendant guilty in this case unless you shall find beyond all reasonable doubt that the said Hunter and March, or either of them, in charge of said trap, were the employees or agents of the defendant corporation, and in that connection you are instructed that one is an employee or agent who is subject to the control or direction of the employer."

Thirty-four. The Court erred in refusing to give to the jury defendant's Instruction No. 18 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"An employee has been defined as one who works for an employer; a person working for a salary or services; a person employed; one who is engaged in the service of another; one whose time and skill are occupied in the business of his employer.

An agent, as the term is used herein, is one who acts for another by the authority of that other; one who undertakes to transact the business or manage the affairs of another by authority or on account of such other."

Thirty-five. The Court erred in refusing to give to the jury defendant's Instructions No. 19 presented to the Court by the defendant and requested to be given to the jury to which said refusal defend-

ant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "If you find from the evidence that Hunter and March had the exclusive right to manage and operate said trap as they might see fit, then you cannot find the defendant in this case guilty of the crime charged, for in that event, although there may have been a contract between Hunter and March and the defendant herein whereby the defendant agreed to take certain fish of Hunter and March, the latter were independent contractors."

Thirty-six. The Court erred in refusing to give to the jury defendant's Instruction No. 20 presented to the Court by the defendant and requested to be given to the jury to which said [159] refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "An independent contract, as the term has been used in the foregoing instruction, is one who contracts to do a specific piece of work, furnishing his own assistance and executing the work entirely in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the other in respect to details of the work. The general test by which it is determined whether a person is an independent contractor or an employee is, who has the general control of the work? Who has the right to direct what shall be done and how to do it?

Thirty-seven. The Court erred in refusing to give to the jury defendant's Instruction No. 21 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further instructed that an indictment is merely a charging paper, and the fact that the indictment in this case charged the defendant with wasting and destroying fish, either many or few is not to be taken by you as evidence in any way and is not to be construed by you as having any bearing upon the question of the guilt or innocence of defendant; nor is the fact that it is alleged that large numbers of salmon have been destroyed to be taken by you in any other way than as a mere charge or allegation. And you are cautioned that you must not allow the contents of the indictment to in any way bias or prejudice you in your deliberations of this case."

Thirty-eight. The Court erred in refusing to give to the jury defendant's Instruction No. 23 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further instructed that the defendant is not required by law to prove that it is innocent, but the Government is required to prove to your satisfaction, beyond all reasonable

doubt, that each and all of the material allegations in the indictment are true, as the term 'reasonable doubt' has been defined to you.

Thirty-nine. The Court erred in refusing to give to the jury defendant's Instruction No. 24 presented to the Court by the defendant and requested to be given to the jury to which said [160] refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that under the laws of Alaska it is unlawful to can or salt for sale for food any salmon more than forty-eight hours after the same has been killed or taken from the water."

Forty. The Court erred in refusing to give to the jury defendant's instruction No. 25 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that if you find from the evidence, beyond all reasonable doubt, that the defendant corporation did unlawfully and wantonly waste or destroy salmon in large quantities, at the time and place alleged in the indictment, before you can find it guilty of the crime charged you must further find from all the testimony before you that there is testimony introduced at the trial of this cause, other than that of William Hunter and Hayward March, the two Government witnesses in this case, tending in some manner to corroborate the testimony

of these two witnesses; and I instruct you that under the testimony offered in this trial, should you find the defendant corporation guilty of unlawfully and wantonly wasting salmon at the time and place alleged in the indictment, then said two witnesses, William Hunter and Hayward March, are two accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices, uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

Forty-one. The Court erred in refusing to give to the jury defendant's instruction No. 26 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"In its operation of its salmon cannery at Kasiloff, the defendant in this action was governed by the provisions of the law known as the Act of June 30, 1906, commonly called the Food and Drugs Act, which provides, in part, as follows:

'That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food * * * which is adulterated * * * within the meaning of this Act. * * * That for the purpose of this Act an article shall be deemed to be adulterated * * *

Sixth: If it consists in whole or in part of a filthy, decomposed, or putrid *anumak* or vegetable **[161]** substance, or any portion of an animal unfit for food, whether manufactured or not.'

Therefore, I instruct you that if the salmon in question alleged to have been wasted and destroyed had in any manner become decomposed before the defendant corporation could get them to its cannery at Kasiloff and can the same, then and in that event said defendant could not have canned said salmon without violating the law above quoted, regardless as to whether the salmon were killed forty eight hours previously or not.''

Forty-two. The Court erred in refusing to give to the jury defendant's instruction No. 27 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

''You are instructed that under the testimony offered by the Government in this case, it has elected to stand upon the 28th day of July, 1913, as the day on which it claims the alleged violation of law, as appears in the indictment, was committed by the defendant corporation. You will, therefore, not consider, in arriving at your verdict, any of the testimony offered, tending to establish a waste or destruction of salmon on any date after the 26th day of July, 1913. And

unless you are satisfied beyond a reasonable doubt, that the defendant corporation unlawfully and wantonly wasted or destroyed a large number of salmon on that date, you must find the defendant not guilty."

Forty-three. The Court erred in refusing to give to the jury defendant's instruction No. 28 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are instructed that in determining whether the defendant unlawfully and wantonly destroyed or wasted a large number of salmon on the 26th day of July, 1913, at the place alleged in the indictment, you are to consider all the evidence before you, and in determining whether any waste or destruction of fish occurred on the date mentioned, as alleged in the indictment, should you find that there was such waste or destruction, you are to consider what notice, if any, the defendant had that there were fish at such trap and what opportunity the defendant had to obtain such fish and can them before they became wasted or destroyed."

Forty-four. The court erred in denying defendant's motion in arrest of judgment. **[162]**

Forty-five. The Court erred in making and entering its order overruling and denying defendant's motion for a new trial which said motion is fully set out in the records of this cause.

Forty-six. The Court erred in making and entering its final judgment and sentence in this case against the defendant, which said judgment and sentence is contained in the records of this cause, on the ground that the evidence was insufficient to justify the verdict rendered by the jury and that said verdict was against the law.

WHEREFORE, defendant and plaintiff in error prays that the judgment of said District Court for the Territory of Alaska, Third Division, be reversed, set aside and held for naught.

DONOHOE and DIMOND,
Attorneys for Defendant and Plaintiff in Error.

Due service of the foregoing Assignment of Errors is hereby accepted by receipt of a copy thereof this 7th day of December, 1916.

H. G. BENNETT,
Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[163]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Petition for Writ of Error.

Comes now Alaska Packers Association, a corporation, the above-named defendant in the above-entitled cause and says; that on the 14th day of October, 1916, the above-entitled court made and entered a judgment and sentence herein against the defendant, adjudging that the defendant pay to the United States of America a fine in the sum of $200;

That in the said judgment and sentence and in the proceedings had prior thereto, certain errors were committed to the prejudice of defendant all of which more fully appears in the Assignment of Errors which is filed with this petition.

WHEREFORE, defendant prays that a Writ of Error do issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit and that such other and further proceedings may be had in the premises as may be proper therein.

DONOHOE and DIMOND,

Attorneys for Defendant and Plaintiff in Error.

Due service of the above petition for a Writ of Error admitted this 7th day of December, 1916, by receipt of a copy thereof.

H. G. BENNET,

Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[164]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Order Allowing Writ of Error.

On this 7th day of December, 1916, came the defendant and plaintiff in error herein, by its attorneys, and filed and presented to the Court its petition praying for the allowance of a Writ of Error, and the Assignment of Errors intended to be urged by him; praying also that a transcript of the record, testimony, proceedings and papers upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

NOW THEREFORE, in consideration of the premises and the Court being fully advised;

IT IS ORDERED, that the aforesaid writ of error be, and the same is hereby allowed.

IT IS FURTHER ORDERED that a transcript of the record, testimony, papers, files and proceedings in this cause, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 54. **[165]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Writ of Error.

The President of the United States, to the Honorable FRED M. BROWN, Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, or some of you, between the United States of America, plaintiff, and

the Alaska Packers Association, a corporation, defendant, manifest error hath happened to the great damage of said defendant Alaska Packers Association, a corporation, as is stated in its petition herein. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit within sixty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and **[166]** and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 7 day of December, 1916.

Allowed by:

FRED M. BROWN,

Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,

Clerk of the District Court for the Territory of Alaska, Third Division.

Entered Court Journal No. 11, page No. 54.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[167]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we Alaska Packers Association, a corporation, as principal and the First Bank of Valdez, of Valdez, Alaska, a corporation, as sureties, are held and firmly bound unto the United States of America, respondent upon this writ of error, in the sum of five hundred dollars ($500), United States gold coin to be paid to the aforesaid United States of America for which payment, well and truly to be made, we bind ourselves and our assigns jointly and severally firmly by these presents.

Dated this 7th day of December, 1916.

WHEREAS, Alaska Packers Association, a corporation, the hereinabove named defendant and principal lately at a session of the District Court for the Territory of Alaska, Third Division, in said court wherein the United States of America was plaintiff

and the Alaska Packers Association, a corporation, was defendant a judgment and sentence was rendered against said defendant, and said defendant having obtained from said court an order allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence entered in **[168]** the aforesaid action, and a citation directed to the United States of America, the Attorney General of the United States of America, and Wm. N. Spence, United States Attorney for the Third Division of the Territory of Alaska, is about to issue citing and admonishing each of said parties to be and appear in the United States Circuit Court for Appeals for the Ninth Circuit to be holden at San Francisco, California:

NOW the condition of the above obligation is such that if the said Alaska Packers Association, above named, shall prosecute its said writ of error to effect and shall answer for all damages, fines and costs that may be assessed against it; if it fails to make its plea good then this obligation is to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said principal and surety have hereunto set their hands this 7th day of December, 1916.

ALASKA PACKERS ASSOCIATION.
By T. J. DONOHOE,
Attorney of Record.

THE FIRST BANK OF VALDEZ.
By M. BLUM,
Vice-President.

[Seal] Attest: J. W. GILSON,
Asst. Secretary.

The sufficiency of the foregoing surety on the foregoing bond, and the foregoing bond approved this 7th day of December, 1916, and execution on the judgment and sentence in this case is hereby stayed.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[169]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Citation on Writ of Error.

United States of America,
Territory of Alaska,
Third Division,—ss.

The United States of America to the Attorney General of the United States and to Hon. WM. N. SPENCE, United States District Attorney for the Third Judicial Division of the Territory of Alaska, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writing, pursuant to a writ of error in the clerk's office of the District Court for the Territory of Alaska, wherein Alaska Packers Association, a corporation, is plaintiff in error and the United States of America is defendant in error, and show cause if any there be why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States this 7th day of December in the year of our Lord the one thousand nine hundred and sixteenth and of **[170]** our Independence the one hundred and fortieth.

FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned, clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto attached is a full, true and correct copy of the original Citation on Writ of Error in Cause No. 437, United States of America, Plaintiff and Defendant in Error, vs. Alaska Packers Association, a Corporation, Defendant and Plaintiff in Error.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 7th day of December, 1916.

[Seal] ARTHUR LANG,
Clerk.

By ————————————,
Deputy.

A copy of the foregoing writ of error and citation on writ of error is hereby accepted this 7 day of December, 1916, by receipt of a certified copy thereof at Valdez, Alaska,

H. G. BENNET,
Asst. United States District Attorney for the Third Division of the Territory of Alaska. **[171]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION,
Defendant and Plaintiff in Error.

Order Extending Time in Which to File Record in the Circuit Court of Appeals, Ninth Circuit.

It appearing to the satisfaction of the Court that thirty days is insufficient time in which to prepare, authenticate, and transmit to the clerk of the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, the records in the above-

entitled cause on Writ of Error from the final judgment rendered on the 14th day of October, 1916, by the District Court for the Territory of Alaska, Third Division.

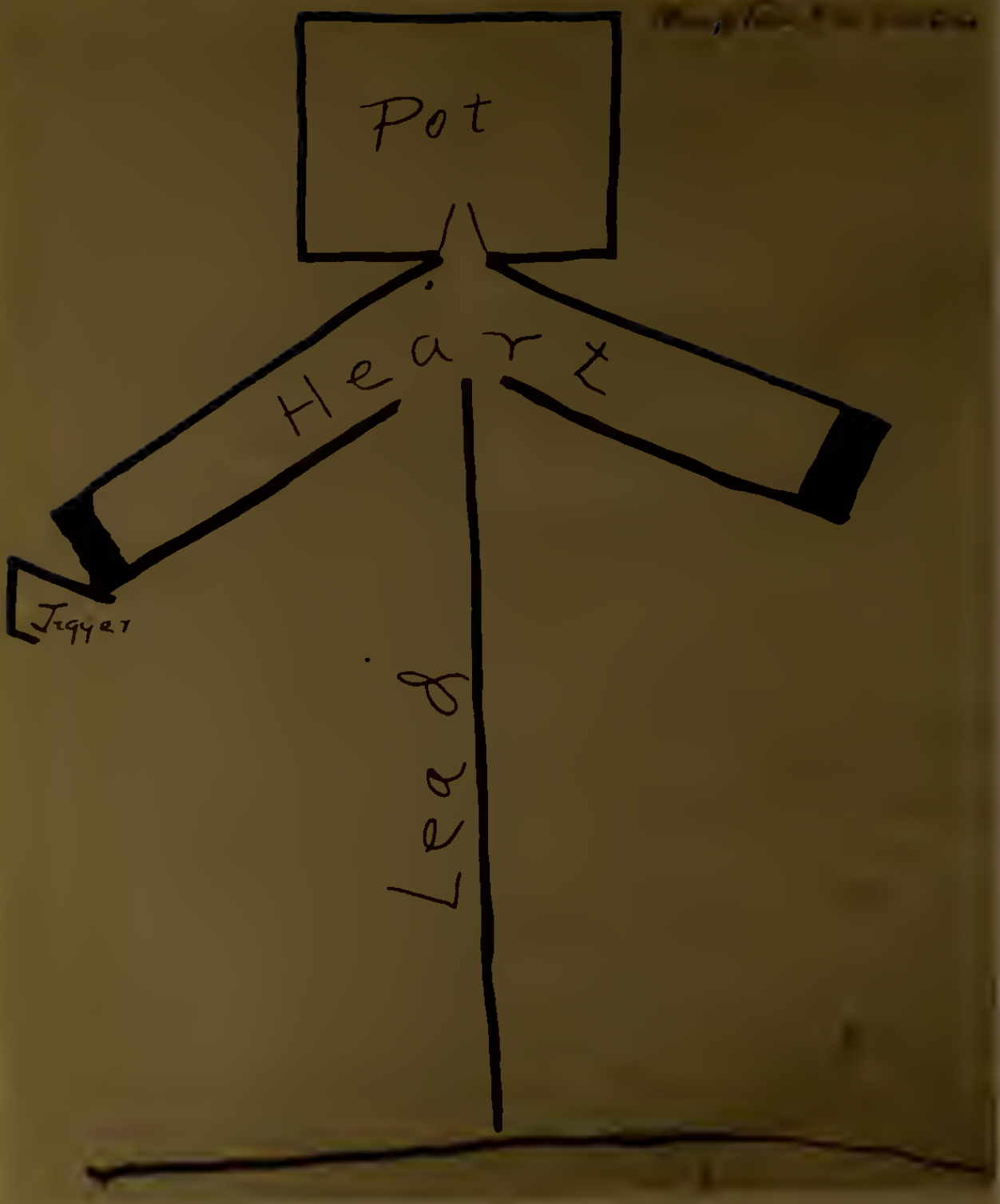
IT IS HEREBY ORDERED that the said Alaska Packers Association, Plaintiff in Error, be given, and is given such additional time as may be required but not in any event to extend later than the 5th day of February, 1917, in which to prepare and transmit the said records in its writ of error heretofore issued in this cause to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California.

Dated this 7th day of December, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 55. **[172]**


Pot
Heart
Jugar
Leaf

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Order Re Transmission of Plaintiff's Exhibit "A."

Good cause being shown, IT IS HEREBY ORDERED that the clerk of this court in transmitting the record of this case to the United States Circuit Court of Appeals for the Ninth Circuit transmit the original Plaintiff's Exhibit "A" instead of making a tracing thereof.

Dated at Valdez, Alaska, this 7th day of December, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 56. **[174]**

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Certificate of Clerk District Court to Transcript of Record, etc.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto attached, typewritten pages, numbered from 1 to 175, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office, December 7th, 1916, and made a part of said transcript, and I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost thereof, amounting to twenty-nine and 25/100 Dollars ($29 25/100), have been paid to me by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 3d day of January, 1917.

[Seal] ARTHUR LANG,
Clerk. **[175]**

[Endorsed]: No. 2927. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Packers Association, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed January 20, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2927

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE H. WHIPPLE,
EVAN WILLIAMS,
DONALD Y. LAMONT,
Attorneys for Plaintiff in Error.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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No. 2927

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Plaintiff in error was convicted of the violation of Section 266 of the Compiled Laws of the Territory of Alaska, providing as follows:

> "That it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska."

The indictment conformed to the wording of the statute, charged but one offense, and fixed the date of that offense as the 30th day of July, 1913.

Upon the trial, the Government offered evidence of fourteen distinct violations by plaintiff in error of

Section 266. This evidence tended to establish one violation per day for fourteen successive days, to wit, from July 26, 1913, to August 8, 1913, inclusive. The fourteen different offenses were presented by the Government in chronological order and when the evidence of the first offense, to wit, that of July 26, 1913, was offered, counsel for plaintiff in error objected to its introduction, unless the Government elected to stand on an offense committed on that day. The objection was overruled and the evidence of that offense and of a similar offense occurring upon July 27, 1913, was admitted. The Government then proceeded to offer evidence of a third violation occurring on July 28, 1913. Plaintiff in error renewed its objection and moved that the Government be forced to state upon which offense it relied. The motion was denied and evidence of the twelve other offenses was thereupon, and over the objections of plaintiff in error, introduced.

It was not until the conclusion of the Government's case that the court directed it to elect upon which violation it would ask a conviction; whereupon its counsel, over the objection of the plaintiff in error, elected the violation occurring upon July 28th. The court later instructed the jury to pass upon the guilt or innocence of plaintiff in error as to that violation, and apparently for that offense and no other plaintiff in error was convicted.

The record presents but one serious question for consideration, namely, whether the plaintiff in error

was convicted for the offense for which it was indicted and tried or for another and different offense. This question is in turn raised by the denial of the motion of the plaintiff in error that the Government be forced to elect, by the ruling made at the close of the Government's case allowing it to stand upon the offense of July 28th, and by the admission of evidence over the objections of plaintiff in error as to any offense other than the one covered by the indictment except for the purpose of showing *wantonness* on the part of plaintiff in error.

Specifications of Error.

Plaintiff in error has assigned as error the following (Record pp. 154-156):

> "Fourth. The court erred in denying defendant's motion made at the time of the introduction of the first evidence by the plaintiff tending to establish the unlawful and wanton waste and destruction of a large number of salmon or other food fish by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment, which said motion is fully set forth in the record of the proceedings of said trial contained in defendant's bill of exceptions.
>
> Fifth. The court erred in overruling defendant's objections to evidence tending to establish the commission of the crime alleged in the indictment on any day other than the 26th day of July, 1913, that being the time elected by law as the date of the crime charged in the indictment for the reason that the plaintiff re-

fused to elect a date and the evidence of the plaintiff's witnesses first given tended to show a wanton and unlawful waste and destruction of a large number of salmon on the 26th day of July, 1913, all of which fully appears in the transcript of the proceedings of said trial contained in defendant's bill of exceptions.

Sixth. The court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of plaintiff's testimony for the reason that the 26th day of July, 1913, had been elected by law as such date as the 26th day of July, 1913, was the date the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed, all of which fully appears from the transcript of the proceedings in the trial contained in defendant's bill of exceptions.

Seventh. The court erred in permitting the plaintiff, over defendant's objections made at said time, to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reason stated in the last preceding assignment of error, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's bill of exceptions."

Argument.

PLAINTIFF IN ERROR WAS TRIED FOR AN ALLEGED VIOLATION OF SECTION 266 OF THE COMPILED LAWS OF ALASKA, OCCURRING UPON JULY 26, 1913, AND CONVICTED FOR A SEPARATE AND DISTINCT OFFENSE OCCURRING ON JULY 28, 1913.

To fully realize the truth of the above contention, it will be necessary to examine more in detail the

proceedings in the lower court. The indictment set forth the violation as occurring on July 30th. We concede that this did not bind the Government to any precise date, if it chose to claim upon the trial that the offense charged in the indictment as a matter of fact occurred upon some other date, but the indictment did cover but one offense, and a conviction for only one offense could be secured thereunder. In this respect the Government was absolutely bound, and the question resolves itself into which one of the fourteen alleged violations was covered by the indictment.

The Government made no express election at the beginning of the trial as to any one of the fourteen offenses. It first of all proved the contract between the complaining witnesses and the plaintiff in error, to the effect that plaintiff in error would take all the fish that the complaining witnesses caught; it proved notice sent to the plaintiff in error on July 25, 1913, that the complaining witnesses had on hand red salmon, which plaintiff in error was under a duty to take, and that the complaining witnesses would continue to have on hand red salmon for several weeks to come. The Government then proceeded in chronological order to prove the waste of fish on the fourteen successive days, commencing with July 26th.

The order of proof of the first three offenses is most vital, and we will, therefore, be obliged to make detailed reference to the transcript. At the very opening of the Government's case, and by the

testimony of Hayward March, the first witness called, it established the contract between the plaintiff in error and the complaining witnesses, to the effect that plaintiff in error would take all the fish which the complaining witnesses caught. We quote from pages 28 and 29 as follows:

> "Q. What was that conversation, what was it about?
>
> A. Me and Mr. Hunter went to Kasiloff on or about the 28th of April, if I remember right, about that time. We landed there in a small boat, called a sloop, landed on the beach—don't know what time of day it was. We went up on the wharf, me and Hunter, and I met Captain Williams and he met me; I knowed him and he knowed me. He said, 'Well, March, what can I do for you?' I said, 'I came down to see about fishing—I understand you are going to buy fish and let out gear, and so on.' He says, 'What gear do you want—trap gear?' and I said 'Trap gear', and he said, 'Make out your list of what gear you want and give it to the beach boss on the wharf, as he is the man that handles that gear.' And I spoke about the fish and he said, 'I will take all your fish and furnish scows, as we have steamers and scows and the Alaska Packers Association can afford to pay you for what little fish you catch,' as Captain Williams knew I wasn't going to catch a hundred thousand fish."

The Government then proceeded to enter more minutely into the relationship between the complaining witnesses and the plaintiff in error and to establish that the contract in question was carried out by the plaintiff in error during the entire run of king salmon in Alaskan waters, to wit, from

May 25th to June 25th, 1913, approximately. It thereupon introduced evidence to the effect that the run of red salmon started upon the 24th day of July, and that Hunter, upon the 25th day of July went to communicate this fact to plaintiff in error. We quote from page 43 of the transcript as follows:

"Q. About what time did the red fish run begin?

A. The run, what we call the run of red fish, started on the 24th.

Q. The big run of red fish?

A. The big run of red fish.

Q. The 24th of what? A. July.

Q. 1913? A. Yes, sir.

Q. What did you do?

A. The morning of the 24th of July I got up as usual. We can take a glass and look at the trap on high tide and if there is a quantity of fish in your trap you can see them, and as I done that, I said to Mr. Hunter, 'I guess the run of salmon is in.' I took the boat and went out to the trap and Hunter started to fix the sloop up—it was lying there from the month of May up to that time—to get word to Captain Williams. I didn't pay much attention to Hunter and he didn't to me. I went to work the trap and took out 2500 fish that day and put them in the scow—2500 red fish.

Q. Took them out of the trap? A. Yes, sir.

Q. On that day that you spoke to Hunter?

A. Yes, sir, the 24th.

Q. And you put them on your scow? A. Yes.

Q. Did you take out any the next day?

A. The morning of the 25th Mr. Hunter went to Kasiloff."

* * * * * * *

"Q. Did you take out any the next day?

A. Yes, sir.

Q. How many did you take out that day?

A. 2500.
Q. Did you say that Hunter went away from the trap? A. Yes, sir.
Q. Where did he go? A. Kasiloff.
Q. When did he leave? A. The 25th.
Q. Of July? A. Yes, sir."

Thus far, absolutely no violation of Section 266 had been shown, in that no waste of any fish by plaintiff in error had been in any way established by the evidence. At this point, however, the Government proceeded to show the first waste of fish, and its proof was neither as to the 30th day of July, the date named in the indictment, nor was it as to the 28th day of July, for which offense plaintiff in error was found guilty. The first showing, on the contrary, was that plaintiff in error upon the 26th day of July was guilty of such violation. It then showed a similar violation on the 27th, and it was not until these two distinct violations had been established that any violation occurring on the 28th day of July was put in evidence. We now quote the pertinent parts of the transcript, found upon pages 44, 45 and 46, showing that evidence as to the offenses occurring upon the 26th and 27th of July was first introduced as follows:

"Q. These 2500 salmon you took out, red fish you took out on the 24th? A. Yes, sir.
Q. And 2500 on the 25th? A. Yes, sir.
Q. Did any boat call from the cannery on those days? A. No, sir.
Q. How many did you take out on the 26th?
A. About a thousand."

* * * * * *

"Q. On the 26th you say you took out a thousand? A. Yes, sir.

Q. On the 27th did you take out any?
A. Yes, sir.
Q. How many? A. About a thousand fish.
Q. You say the boat did not call on the 24th?
A. No, sir.
Q. Nor on the 25th? A. No.
Q. Did it call on the 26th? A. No.
Q. I mean the cannery boat? A. No, sir.
Q. That boat was called what?
A. The 'Reporter'.
Q. The 'Reporter' didn't call on either of these three days? A. No, sir.
Q. Did it call on the 27th? A. No, sir.
Q. How many did you take out on the 27th?
A. About a thousand fish.
Q. Now, you had 2500 on the 24th, 2500 on the 25th, a thousand on the 26th and a thousand on the 27th? A. Yes, sir.
Q. What became of these fish?
A. On the 26th——"

* * * * * *

"A. On the 26th I have taken out about a thousand fish. I kicked them into the two boats I had. There was too much for one boat and I divided them up into two boats and I took those fish out and put them all in one boat—it was smooth water and I kept the fish there all day until evening thinking the steamer would come.

Mr. DONOHOE. Is that the evening of the 26th you are speaking of?

A. Yes, sir. And the steamer didn't come, and I held the 5000 fish I had in the scow; I dumped them overboard and threw the fresh fish in. On the 27th I took out about a thousand fish and threw them into the scow."*

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* That the foregoing testimony established an offense committed upon the 27th day of July, is readily apparent by bearing in mind Section 265 of the Compiled Laws of the Territory of Alaska, as follows:

"It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed."

It was not until after the following question had been put by the Government that any evidence as to the 28th was offered (see page 46):

"Q. When did the boat come, the 'Reporter', the cannery boat?"

The answer to that question was, "The 28th".

It was then for the first time that the Government established the offense occurring upon July 28th, and for which plaintiff in error was convicted, as follows (Transcript, pages 46, 47, 49):

"Q. The cannery boat came on the 28th?

A. Yes, sir.

The COURT. How far is it from the cannery to this trap, about?

A. About 28 miles.

Q. It came on the 28th—at what time, in the morning or evening?

A. I believe on the flood tide—it was somewhere around high water I know, when the boat came.

Q. What time? A. I couldn't exactly tell.

Q. How many fish did you have for them then?

A. I had then two thousand fish in the scow."

* * * * * * *

"Q. What was done on the 28th?

A. On the 28th the steamer 'Reporter' called, Captain Christiansen. He asked me what fish we had in the scow and I told him I had 2000 fish in the scow. 'Well', he says, 'I have got orders from the superintendent to come over and give you a receipt for what fish you have got, but I ain't going to take them.'

Q. He wouldn't take any?

A. He didn't take any.

Q. What became of the fish?
A. I threw them overboard.
Q. He wouldn't take the fish? A. No.
Q. Did he go away without any fish?
A. I scooped a few fish out alive as he laid there—I ripped the webbing from my trap and took them out with a scoop net, but I didn't count them. He gave me a receipt for the 2,000.
Q. He gave you a receipt for the 2000 and told you to throw them overboard? A. Yes, sir.
Mr. DONOHOE. We object to that—he didn't say that—to throw them overboard.
Q. Well, he wouldn't take them? A. No, sir."

THE GOVERNMENT SHOULD HAVE BEEN FORCED BY THE COURT, TO ELECT AT THE OPENING OF THE CASE UPON WHAT OFFENSE IT RELIED, AND IN THE ABSENCE OF SUCH EXPRESS ELECTION, IT MUST BE DEEMED TO HAVE ELECTED THE FIRST OFFENSE ESTABLISHED BY THE EVIDENCE, TO WIT, THAT OF JULY 26TH. IT WAS THEREFORE ONLY FOR THAT OFFENSE THAT PLAINTIFF IN ERROR WAS ON TRIAL AND COULD HAVE BEEN CONVICTED.

It is well established law that in criminal cases evidence of other and similar offenses occurring about the same time is only admissible in corroboration of such elements as motive and intent. No doubt in this case the learned judge in the trial court allowed the introduction of the numerous offenses, upon the theory that it was corroborative evidence as to the *wanton* perpetration by the plaintiff in error of the offense charged in the indictment. But even though such evidence is admissible under circumstances, like the present,

there are certain well established principles of criminal law which must be borne in mind. The first and foremost is that a person charged with a criminal offense is only expected to prepare a defense as to the crime with which he is charged and not as to thirteen others. He is entitled to know at the very outset of his trial upon what offense the Government relies. The second principle to be borne in mind is that other and similar offenses are only admissible as corroborative evidence and not in any sense as direct evidence to the effect that a defendant in a criminal matter committed the crime with which he is charged. Under these circumstances, until there is evidence in the record of the crime with which the defendant is charged, there is no evidence to be corroborated, and the proof of other offenses has no place.

Bearing the two foregoing principles in mind, the courts have almost universally held that the prosecution must elect at the beginning of the trial, and where the prosecution proceeds without electing, the law will elect for it, and designate the first violation established to be the one covered by the indictment. Since these considerations are vital to the rights of plaintiff in error, we will set forth the authorities at length:

In *People v. Flaherty,* 162 New York 532, the exact point was presented for the consideration of the ~~Circuit~~ Court of Appeals of New York. The facts were, briefly, as follows: The defendant had been indicted for the crime of an act of sexual

intercourse with a female, not his wife, under the age of 16 years, the indictment charging but one offense. The complaining witness testified that the defendant had had sexual intercourse with her on seven different occasions prior to her becoming of the age of 16 years, and at the very outset of the trial counsel for the defendant moved that the prosecuting attorney be forced to elect upon which of the seven offenses he would demand a verdict of guilty. The motion was denied and it was not until the close of its case that the prosecution made any selection.

The [redacted] Court of Appeals held that the failure of the trial court to force the prosecution to elect at the very outset was error and the judgment of conviction was reversed.

Due to the fact that in that case not only the exact legal principle was involved, but also for the purposes of this argument a situation identical with the present, we take the liberty of quoting from that decision at greater length than would ordinarily be permissible as follows:

> "* * * (p. 538) As these errors call for a reversal of the judgment, we might not consider the case further were it not that the trial was conducted in distinct violation of the right of the defendant in most important respects, and as the same course was pursued on the former trial to a certain extent, it seems to be our duty to guard against the repetition on the next trial of some errors most damaging in effect, which the defendant has had to meet on the previous trials. The indictment charges the defendant

with the crime of an act of sexual intercourse with a female not his wife under the age of sixteen years, and alleges in due form that the act constituting the crime was committed on the 1st day of July, 1892. The complainant says that the defendant had sexual intercourse with her on seven different occasions prior to her becoming of the age of sixteen years. Notwithstanding the fact that if all of said acts were committed they constituted seven distinct crimes, for only one of which defendant was or could have been charged in this indictment, the People were permitted on the former trial to prove all of these acts and the jury authorized to find the defendant guilty, provided they found he had committed any one of them. On the trial, which is the subject of this review, the court refused to follow the precedent thus set for it in one respect only; it did hold finally that the defendant could be convicted for only one offense, but that decision did not go far enough, as we shall see, nor was it made at the time that it should have been. The defendant was represented by skilled counsel, who, although having but a very short time for the preparation of the case, fully appreciated the difficulties that had unjustly been placed upon the defendant on the former trial to defend against seven distinct crimes where but one was or could have been charged, and so, at the very opening of the trial, by request to the court, and also to the district attorney in open court, by direct motion made and objection to evidence taken, the counsel presented in almost every way conceivable to the court that the defendant was charged with but one crime, could be tried for but one, and was entitled to know at the very beginning of the trial whether he was to be tried for a crime committed on the date alleged in the indictment, and if not, then that the People should state the date of the crime which it was pur-

posed to prove as the one charged in the indictment. But the district attorney protested that it was his right to prove as many similar crimes as he could and to submit any one he chose as the one charged in the indictment. The court sustained the position of the district attorney and for seven days the taking of testimony on the part of the People proceeded, during the course of which twenty-one witnesses were called and testified to various outlying circumstances offered apparently in the hope that they might be in the end regarded as in some way corroborating the complainant as to some one of the transactions detailed by her. A long, skillful and, at times, effective cross-examination had taken place, but without any knowledge on the part of the cross-examiner as to which one of the seven acts about which the complainant testified was to be submitted to the jury as the crime charged in the indictment. The People rested and then the court offered to entertain a motion to compel the People to elect upon which one of the transactions it would stand. The motion was made; direction to the People given; selection made; and then just at the very moment when the defendant was obliged to put his witnesses on the stand in support of his defense he was advised, and for the first time, for what particular crime his conviction was to be asked at the hands of the jury." * * *

"* * * (p. 540) And yet, as we have seen, the People were permitted to prove these seven distinct acts as seven distinct crimes charged in the indictment, for either one of which the defendant could be convicted under the indictment, the choice of selecting the one upon which the jury should be asked to find a verdict of guilty being left to the close of the People's case and could well have been left, according to the view of the district attorney,

until it became time to present the case to the jury. In other words, the effect of erroneously alleging a crime as having been committed on a particular date has, if this view be correct, great advantages for the prosecution over that of alleging things truly as the law contemplates; for in the latter case even the district attorney would not contend that he could offer evidence tending to prove six other crimes and ask for the conviction for such one of them as he should elect. But the error of date in the indictment, whether the result of mistake or intention, carries with it no such power to the prosecuting officer. * * * It is not difficult to understand how the court came to fall into error in respect to the matter we have been considering; for to the general rule that a defendant in a criminal action cannot have proved against him the commission of other crimes unless he puts his character in issue, there is an apparent exception where the charge is of unlawful sexual intercourse. Such evidence, however, is not admitted for the purpose of proving other offenses against the law, but solely upon the view that it may tend to corroborate the complainant's account of the acts alleged in the indictment as constituting the crime." * * *

"* * * (p. 542) We do not mean to say that a trial court should not, under any circumstances admit corroborative evidence in advance of evidence tending to prove the offense charged, but there was no excuse for taking that course in this case. The grievance of the defendant herein is founded upon much broader lines than the mere order of procedure, and is that the court sustained the efforts of the district attorney to prevent him during seven days of the trial from finding out as to which one of the seven offenses testified to by the complainant he was indicted for and

> was to be tried for. This was done on the erroneous view of the law that the indictment covered not simply one offense, but each and every one of seven distinct offenses down to such time as the district attorney should be pleased to elect, or the court should compel him to choose, one offense for presentation to the jury, at which moment the other six offenses would cease to be covered by the indictment. This is a view for which we have been unable to find any support either in principle or authority."

The language above quoted will bear a most thorough analysis, and such analysis will show conclusively that exactly the same steps were taken by the defendant in that case as were taken by the plaintiff in error and that the position of the defendant in that case was identical to the position of the plaintiff in error. The court of New York in the foregoing language first lays emphasis upon the fact that the indictment charged but one offense and under it only one conviction could be had. It then lays emphasis upon the fact that at the opening of the trial counsel for the defendant moved that the prosecution be forced to elect, and took objections to the evidence upon the ground that no election had been made. We refer the court to pages 44 to 48, inclusive, of the transcript for a similar motion and similar objections.

The New York court dwells upon the circumstance that counsel for the defendant was forced to conduct a cross-examination involving seven distinct crimes, not knowing at any time during that cross-

examination which of the seven distinct crimes was covered by the indictment. The exact situation was presented in this case except that the number of crimes involved was fourteen instead of seven, and, furthermore, the very difficulty under which counsel for plaintiff in error was forced to labor was expressly pointed out to the court at the beginning of the trial. This can be readily seen at page 48 of the transcript where counsel for plaintiff in error stated as follows:

> "So I may conduct my cross-examination properly and understand the position of the court, I wish to ask at this time what particular day you will instruct the jury, if they shall find a verdict against the defendant, on what particular date they must find the fish were wasted."

The court in the Flaherty case lays stress upon the fact that, at the close of the case for the People, the trial court stated that it would entertain a motion to compel the prosecution to elect as to which offense was covered by the indictment. The exact situation is presented upon page 85 of the transcript as follows:

> "By the COURT. Before plaintiff closes its case I think it should be required to elect on what date it will stand for a conviction in this case. On what date it will elect to try the charge of wanton destruction of fish, and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of

> the charge when the offense relied upon for a conviction was committed, if committed at all. Now if you will elect what date you desire to stand on, Mr. Munly——
>
> Mr. MUNLY. Since the court has announced the law in the case to that extent I will elect the 28th day of July, 1913, to stand upon."

It would thus seem that *People v. Flaherty* is absolutely conclusive of the present matter. Nevertheless, not desiring to ask this court to base its decision upon one case alone, we advance to the consideration of further authorities.

In *Fields v. Territory of Wyoming,* 1 Wyoming 78, the same question was also involved. In that case the defendant was indicted under a statute prohibiting the permitting of a certain game of chance to be dealt in a house under his control, etc. The indictment alleged that the defendant, on the first day of January and on divers other dates and times, before and since that day, unlawfully did keep and deal, and permit to be kept and dealt in a building under his control, a certain game of chance, etc.

Upon the trial the first witness on behalf of the prosecution testified to such an offense on or about the seventh or eighth day of January. The next witness was asked the following question by the prosecution:

> "State whether or not you ever saw any game of poker played in the building kept by or under the control of the defendant within two years next prior to the twenty-seventh day of January, 1872?"

The question was objected to upon the ground that the evidence must be confined to the particular game concerning which evidence had been already given to the jury. The evidence was admitted; the judgment was reversed and a new trial ordered upon the ground that, since the indictment could cover but one offense, the first offense proven by the prosecution was an election to ask a verdict of guilty upon that offense, and that the prosecution was from that moment bound by such election. The court, upon pages 80 and 81, spoke as follows:

> "(p. 80) It is immaterial what date is alleged as the day on which a crime was committed in an indictment, provided such day be prior to the finding of the indictment and within the time prescribed by the statute of limitations; but the rule as to proof under an indictment is not so liberal, as it must be confined to a given crime and to a given time.
>
> "For instance, in this case, the indictment may have covered either of a dozen distinct offenses under the section of the statute upon which the indictment was founded. That is, William Fields may have been guilty of keeping or dealing, or permitting to be kept or dealt in a building under his control, the particular game of poker, as prohibited by the statute, on a dozen times and occasions previous to the finding of the indictment and within the time fixed by the statute of limitations, but on the trial on the particular indictment, the prosecution should have confined the proof to one distinct offense, if more than one offense had been committed. Evidence can be only offered tending to prove one distinct offense, and when such offense has been fixed as to time and place, the proof should be confined to it alone, the rule being

that evidence of a distinct, substantive offense, cannot be admitted in support of another offense. In this case, the prosecution, by the witness Keplinger, fixed a time when the alleged misdemeanor, as charged in the indictment was committed, and all evidence not tending to prove this alleged misdemeanor, on objection of defendant, should have been ruled out by the district court."

The State of Connecticut v. Bates, 10 Connecticut 372.

In this case the defendant was convicted of the crime of adultery. The information charged but one offense, and the question, as tersely stated by the court was whether the prosecutor, after having given evidence of one act of adultery, would still be permitted to introduce proof of any number of acts with the same person. The court held in the negative and pointed out the viciousness of allowing such a course of procedure as follows:

"(p. 373) The accused comes prepared to defend against a single charge. This he may do successfully—and having done so, may find himself overwhelmed, by a multitude of others, of which the information gave him no notice and against which he cannot be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury by proving any number of offenses, and then elect upon which to claim a conviction. And why should this be done? He is supposed to be in possession of the proofs, and should make his election from the first. In this there can be no hardship; and such is the well settled rule in all analogous cases.

> "Thus, in an action of assault and battery, if the declaration contains but one count, the plaintiff, after proving one assault, cannot waive that and proceed to give evidence of another. 3 Stark. Ev. 1440. Stante v. Pricket, 1 Campb. 473. Burgess v. Freelove, 2 Bos. & Pul. 425. 2 Phill. Ev. 143."

In *People v. Williams*, 65 Pacific 323, the Supreme Court of California had occasion to pass upon the same point. That was a case where the defendant had been convicted of rape, and, although more extreme than the present case in that the trial court later allowed the jury to find the defendant guilty on any one of numerous offenses, still the rule as laid down would prohibit any such course of procedure as was allowed in the present matter, for Temple, J., speaking for the court, expressed himself as follows:

> "(p. 325) * * * I think the prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several different offenses under the indictment, should at least as early as the commencement of the trial inform the defense upon proof of what specific offense he intends to rely; and, if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and, unless that precise offense is proven, the defendant is entitled to an acquittal. Even this would leave a defendant in such cases at a disadvantage, but he ought not to be tried under less favorable circumstances. The judgment and order are reversed, and a new trial ordered."

Wickard v. State, Alabama, (1896) 19 Southern 491, involved a conviction of defendant for

gambling and the prosecution, after introducing evidence of one offense was allowed, by the trial court, over the defendant's objection, to introduce evidence as to a subsequent offense. The case was reversed by the Supreme Court of Alabama upon the ground that, by introducing evidence of the first offense, the prosecution had elected to abide by that offense in asking a conviction. The court spoke as follows:

> "(p. 492) When the state introduced evidence to show that the defendant played at a game of cards and bet money thereat, at Neal Burns' house on a Saturday in December, 1891, it thereby elected to prosecute for that offense; and it was not competent thereafter to introduce evidence of other and distinct offenses, comprehended within the indictment, committed by the defendant at the same or other places. Smith v. State, 52 Ala. 384."

The Supreme Court of Alabama, prior to the last mentioned case, had had occasion to pass upon the same question in *Cochran v. State,* 30 Alabama 542, where the defendant had been convicted under a similar statute. Substantially the same set of facts were presented and the holding was the same. The pertinent part of that decision is found at the bottom of page 546 and is as follows:

> "Under such indictment, the election of the State is made by introducing evidence of any act charged in it; and after introducing evidence of any such act, the State cannot give evidence of any other act charged. * * * Elam v. The State, 26 Ala. 48; 2 Greenlf. on Ev. Sec. 86; Stante v. Prickett, 1 Camp. 473;

> Gillon v. Wilson, 3 T. B. Mon. 217. 'If the prosecuting officer deems it for the interest of the State that evidence as to different offenses should be offered, he must frame the indictment accordingly; which is in every case very easily done. * * * Elam v. The State, 26 Ala. 48. But, under the indictment in this case, the court below erred in admitting the evidence as to the playing in the bed-room of the defendant's shop, after the State had introduced evidence as to the playing in the room over the barber's shop."

In *Richardson v. The State,* 63 Indiana 192, the Supreme Court of Indiana considered the same question in a case involving an assault and battery for which the defendant had been convicted. The State had attempted to first prove one assault and battery and then, by other evidence, establish a distinct and separate assault and battery, performed by the defendant upon the same person. This the trial court allowed the prosecution to do, but, upon appeal, the case was reversed, the Supreme Court holding that once the prosecution had presented evidence of an offense within the terms of the indictment, it had elected to stand upon that offense and could not later abandon the same and elect to proceed upon a new offense.

The Supreme Court of Michigan in *People v. Clark,* 33 Michigan 112, discussed the principle for which we are contending as follows:

> "(p. 114) It was decided in People v. Jenness, 5 Mich. 327, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was

charged in the information, which occurred within the jurisdiction of the court and within

The following cases are also to
same effect:

Elam v. State, 26 Ala. 46.
People v. Jenness, 5 Mich. 3
Newsom v. Commonwealth, 140
People v. Castro, 133 Cal. 1
People v. Bartnett, 15 Cal, A
State v. Murphy, 9 Lea 375 (

that the court erred in refusing to
Government to expressly elect upon which offense it relied, and that furthermore in the absense of such election the law designated the offense of July 26th as the only one for which plaintiff in error could be tried.

No doubt it will be urged against this contention that the express election by the Government made at the close of the Government's case, whereby it chose the 28th day of July, superseded and annulled the effect of the election designated by law. The answer to this argument is, that the damage already had been done, for plaintiff in error had been forced to prepare for the defense of fourteen distinct offenses, and upon cross-examination of the Government's witnesses had been obliged not only to cross-examine as to the one offense covered by the indictment, but as to thirteen others. No better statement of the hardship placed upon plaintiff in error can be found than in *People v. Flaherty* (see supra).

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> "(p. 114) It was decided in People v. Jenness, 5 Mich. 327, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was

> charged in the information, which occurred within the jurisdiction of the court and within the period of the statute of limitations, but when evidence had been introduced tending directly to the proof of one act, for the purpose of procuring a conviction upon it, the prosecutor had thereby made his election and could not be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause."

Applying the rule laid down by the foregoing authorities to the case at bar, we find first of all that the court erred in refusing to direct the Government to expressly elect upon which offense it relied, and that furthermore in the absense of such election the law designated the offense of July 26th as the only one for which plaintiff in error could be tried.

No doubt it will be urged against this contention that the express election by the Government made at the close of the Government's case, whereby it chose the 28th day of July, superseded and annulled the effect of the election designated by law. The answer to this argument is, that the damage already had been done, for plaintiff in error had been forced to prepare for the defense of fourteen distinct offenses, and upon cross-examination of the Government's witnesses had been obliged not only to cross-examine as to the one offense covered by the indictment, but as to thirteen others. No better statement of the hardship placed upon plaintiff in error can be found than in *People v. Flaherty* (see supra).

It thus being fully established both by principle and authority that in the present matter the plaintiff in error was tried, if at all, for an offense occurring upon July 26th, it only remains, in order to fully realize that plaintiff in error was found guilty of another and different crime, to refer to the election made by the Government on page 85 of the transcript as follows:

> "Since the court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon."

And to Instruction 5, found upon pages 122 and 123 of the transcript as follows:

> "The jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on the said 28th day of July, 1913.
>
> There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

> And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as providing the alleged offense, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth."

We have therefore the following situation presented in this case: The plaintiff in error was charged in the indictment with but one offense. The Government was erroneously allowed to establish fourteen distinct offenses, without electing upon which of the fourteen it relied. Due to the failure of the Government to elect, the law elected the offense committed upon the 26th day of July, 1913. The Government was allowed at the close of its case to depart from the election made by the law and rely upon the offense occurring upon July 28, 1913. For the offense occurring on July 28, 1913, the plaintiff in error was convicted. Under these circumstances, it must be manifest to this court that the plaintiff in error was tried for a crime for which it was not convicted, and convicted for a crime for which it was not tried. The error thus committed is patent. It demands no further citation of authority or discussion of principle. But one conclusion can follow—the judgment of conviction must be set aside.

Dated, San Francisco,
May 9, 1917.

Respectfully submitted,

GEORGE H. WHIPPLE,
EVAN WILLIAMS,
DONALD Y. LAMONT,